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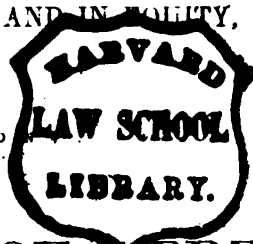
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REPORTS

OF CASES

AT COMMON LAW AND IN EQUITY,

DECIDED



THE COURT OF APPEALS OF KENTUCKY.

BY BEN. MONROE,

REPORTER OF THE DECISIONS OF THE COURT OF APPEALS.

VOL. XII.

CONTAINING THE CASES DECIDED AT THE SUMMER AND WINTER TERM, 1851.

FRANKFORT, KY:
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1852.

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Entered, according to the Act of Congress, in the year 1852,
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In the Office of the Clerk of the District Court of the United States, for the District of
Kentucky, in the Eighth Circuit.

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JUDGES OF THE COURT OF APPEALS.

At the election held in May, 1851, for Judges of the Court of Appeals, the following Judges were chosen, viz:

For the 1st. District,	Hon.	JAMES SIMPSON,
" 2nd.	" "	THOMAS A. MARSHALL,
" 3rd.	" "	B. MILLS CRENSHAW,
" 4th.	" "	ELIJAH HISE.

The Judges having determined their position, as required, the result was as follows;

Hon.	JAMES SIMPSON,	CHIEF JUSTICE,
"	ELIJAH HISE,	
"	THOMAS A. MARSHALL,	}
"	B. MILLS CRENSHAW.	

JUDGES.

JUDGES OF THE CIRCUIT COURTS IN KENTUCKY,

With the No. of Districts and residence—Elected in May, 1851.

Hon.	Name	District	Residence
Hon.	RUFUS K. WILLIAMS,	1st District:	Graves county,
"	HENRY J. STITES,	2d "	Christian, county,
"	JESSE W. KINCHELOE,	3d "	Breckenridge Co.,
"	ASHER W. GRAHAM,	4th "	Warren county,
"	ZACHARIAH WHEAT,	5th "	Adair county,
"	WM. F. BULLOCK,	6th "	Jefferson county,
"	JOHN L. BRIDGES,	7th "	Boyle county,
"	JAMES PRYOR.	8th "	Carroll county,
"	WALKER REID,	9th "	Mason county,
"	JAMES W. MOORE,	10th "	Montgomery county,
"	WM. C. GOODLOE,	11th "	Madison county,
"	GREEN ADAMS,	12th "	Knox county,
"	HENRY PIRTLE, <i>Judge of the Louisville Chancery Court, Louisville.</i>		

PRINCIPAL OFFICERS
OF THE
STATE OF KENTUCKY
AT THE TIME OF THE PUBLICATION OF THIS VOLUME.

LAZARUS W. POWELL,

GOVERNOR.

JOHN B. THOMPSON,

LIEUT. GOVERNOR.

DAVID MERIWETHER,

SECRETARY OF STATE.

JAMES HARLAN,

ATTORNEY GENERAL.

THOMAS S. PAGE,

AUDITOR OF PUBLIC ACCOUNTS.

RICHARD C. WINTERSMITH,

TREASURER.

ELISHA A. MACURDY,

REGISTER.

R. J. BRECKINRIDGE,

SUPT. PUBLIC INSTRUCTION.

D. R. HAGGARD,

PRES. BOARD INT. IMPROVEMENT.

DECISIONS

OF THE

COURT OF APPEALS

OF KENTUCKY.

SUMMER TERM....1851.

Hostetter vs Commonwealth.

ERROR TO THE FAYETTE CIRCUIT.

Scire facias. Justices of the Peace. Bail.

SCI. FA.

Case 1.

JUDGE CRESSHAW delivered the opinion of the Court.

June 5.

The only law conferring power upon Justices of the Peace to take a recognizance in the state of case presented in this record, of which we are apprised, is an act of the Legislature, approved February 11, 1809, 1st Vol. Stat. Laws, page 538. By virtue of this act, two Justices of the peace, when any free person is brought before them upon a criminal charge, who ought, in their opinion, to be tried before the Circuit Court, have the right to admit the accused to give bail for his appearance before the Circuit Court, "*on the first day of the next succeeding term.*" The recognizance taken in this case is for the appearance of the accused before the Fayette Circuit Court, "*on the twelfth day of the then present term of said Court.*"

Justices of the Peace have power to take recognizances for the appearance of those charged with criminal offences, on the first day of the next succeeding term of the Circuit Court—but not for appearance on any other day of the term.

The justices not having acted in conformity to the law, it results that the Court below erred in not sus-

VOL. XII.

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WILSON
vs
COM' NWEALTH

Whether, since the passage of the act of 1837: (3 Statute Law, 363,) a recognizance for appearance on the second day of the term might not be valid—not decided.

taining the demurrer of Hostetter to the *scire facias*, and in rendering judgment against him.

By the fourth section of an act, approved February 23d 1837, 3d Vol. Stat. Laws, page 359, all indictments and prosecutions in the name of the Commonwealth, requiring a jury a jury to try them, are directed to be docketted for trial on the *second*, instead of the *first* day of the term. And we do not intend to be understood as deciding that, since the passage of this statute, the justices might not have a right to admit a prisoner to bail for his appearance in the Circuit Court, on the *second* day of the next succeeding term; nor, do we express the opinion that the recognizance in this case may not be considered obligatory as a common law bond. It will be time enough to decide these questions when they may arise.

Judgment reversed, and the cause remanded, with directions to the Court below to set aside the judgment herein, and to sustain the demurrer to the *scire facias*.

D. M. Payne for plaintiff; *Harlan*, Attorney General, for Commonwealth.

INDICTMENT.

Case 2.

Wilson vs The Commonwealth.

ERROR TO THE LEXINGTON CITY COURT.

Indictment. Nuisances. Slaves.

June 7.

JUDGE MARSHALL delivered the opinion of the Court.

Charges in the indictment.

THIS is an indictment in the City Court of Lexington, for keeping a disorderly house in that city, "to the great damage and common nuisance of the citizens of this Commonwealth," &c. The gravamen and sub-

stance of the charge, is that the defendant, for his own lucre and gain, did, on a day designated, and at divers other times, cause and procure certain evil disposed persons, who were slaves, not belonging to him, to frequent and come together in his house, and did unlawfully permit them, at divers times, at night and by day, to be and remain in the said house, drinking, tippling, and buying of him ardent spirits—whiskey, wine, brandy, &c.

WILSON
VS
COM'NWEALTH

The 65th section of the act of 1842, to reduce into one the acts and amendatory acts incorporating the city of Lexington: (*Session Acts*, 260,) gives to the City Court of Lexington, concurrent jurisdiction with the Circuit Court of Fayette, in prosecutions by indictment or presentment, for breaches of the peace, nuisances, and violations of the statutes against gaming, occurring in the city of Lexington; and authorizes a grand jury in that Court to inquire into such offences. A subsequent act of 1845: (*Session Acts*, 196,) gives to the City Court of Lexington exclusive jurisdiction of all pleas of the Commonwealth, arising within that city, except cases of felony.

And according to the principles laid down in the case of *Smith vs The Commonwealth*: (6 B. Monroe, 22,) and to which we still adhere, a house in which slaves are permitted from time to time to assemble and remain, drinking, tippling, and buying ardent spirits, is a disorderly house, and a common nuisance. And we are satisfied that it should be so considered, whether the liquor is sold or given to the slaves, with or without the permission of their owner. For, although the owner of a slave may authorize the gift or sale of liquor to his slave, on one or more occasions, he cannot legalize the act of permitting slaves, on divers occasions, and habitually, to assemble and remain in the house of another—drinking, tippling, and buying ardent spirits from him.

A house in which slaves are permitted from time to time to assemble and remain, drinking, tippling and buying ardent spirits, is a disorderly house (6 B. Monroe 22) and a nuisance: and that the owners of the slaves permitted the sale to them will not exonerate the keeper of the house from the penalty of the law.

But this indictment charges that the defendant unlawfully caused and procured the slaves to frequent and come together, and unlawfully permitted them to be

When the indictment charges that the defendant permitted slaves unlawful.

WILSON
vs
COM'NWEALTH

ly to be and remain about his house, buying, tippling, and drinking, it is sufficient.

The City Court of Lexington have the same power to suppress nuisances and in the same mode, as the Circuit Court had before the change of jurisdiction to the City Court, unless the city had passed an ordinance changing the punishment.

and remain in his house—drinking, tippling, and buying ardent spirits—which sufficiently negatives any implication of a permission from their owners, if such negation were necessary.

We are of opinion, therefore, that the indictment contains facts enough to constitute a nuisance, and an offence of which the City Court of Lexington has undoubted jurisdiction. And, although by the 35th section of the act just above referred to: (*Session Acts of 1842, 255,*) the Mayor and Councilmen of the city have power “to suppress, by ordinances, with suitable penalties, all tippling houses, bawdy houses, disorderly houses, &c., &c.; still, as it is not shown, and we have not discovered that the city authorities have passed any ordinance for the suppression of a nuisance of the character of that described in this indictment, and as the offence charged is to be regarded as a common law offence. punishable by fine or imprisonment, at the discretion of a jury; the form of the indictment, the mode of proceeding, and the power of the Court and jury, are the same in the City Court, as they would have been in the Circuit Court of Fayette, if the jurisdiction had not been changed. The only necessary difference is in the style of the Court, and in the substitution of the city of Lexington for the county of Fayette. Whether, if the city authorities had passed an ordinance for the suppression of nuisances, of the sort described in this indictment, by such penalties as they are authorized to inflict, the common law punishment would be necessarily superseded, is a question which does not arise in the absence of such ordinance. We remark, however, that the fifth section of the act of 1840: (*3 Stat. Law, 571,*) though it declares that the authorized ordinances of city authorities, shall be enforced, in all respects, as if no legislative act had been passed on the same subject, does not expressly give to such ordinance the effect of repealing or superseding the legislative act, and makes no reference to the common law, where there has been no legislation on the particular subject. Whether it intended to impart to the ordinance such

overruling consequence, is a serious question, which we need not now consider.

It follows from the views which have been presented, that the demurrer to the indictment was properly overruled. The same views also, meet the objections urged on the motion in arrest of judgment, except that which supposes that a prosecutor was necessary, for which we know of no authority.

With regard to the sufficiency of the evidence to support the indictment for a nuisance, and to sustain the verdict against the defendant, assessing a fine of \$100, it is not necessary that we should express an opinion, because the verdict was found under an erroneous instruction of the Court, which entitled the defendant to a new trial. The instruction declares in effect that the offence as a nuisance is complete if the defendant was in the habit of selling spirituous liquors to slaves during the time covered by the indictment, that is, within twelve months before it was found by the grand jury.

But the selling of liquor to slaves is not unlawful, unless it be done without the permission of their owners; and the habitual selling of liquor to slaves with the permission of their owners or masters, does not of itself constitute a nuisance, or any offence in the vendor, because each act is authorized by law.

If the indictment had merely charged the selling of spirits to slaves on a certain day and at divers other times, it must have alleged that it was done without the permission of their owners, and the jury must have believed from the evidence that it was so done, to justify a verdict against the defendant.

It has not been heretofore decided that this offence though repeated every day would make the house in which it was committed a disorderly house and a common nuisance, unless the slaves were habitually allowed to assemble in the house and buy liquors, and drink and tittle.

But conceding as we are inclined to do, that the frequent and habitual selling of liquor to slaves without

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No prosecutor
necessary to an
indictment for a
nuisance in the
City Court of
Lexington.

The selling of
spirituous li-
quor to slaves is
not unlawful,
unless done
without the per-
mission of the
owners or mas-
ters, but to as-
semble frequent-
ly in the house
and drink tittle
&c., would
create a nuis-
ance.

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the permission of their owners, and in a house used or kept for the purpose, would constitute the offence of keeping a disorderly house and be a common nuisance, we are of opinion that all of these facts must concur, and they must be frequent and habitual, and not merely occasional or rare in order to constitute the nuisance.

If the offence be not so repeated as to constitute a nuisance, then each offence of unlawfully selling might be punished separately.

If the unlawful act be occasional only, each offence is properly punishable by inflicting the prescribed penalty for each. If it be habitual and continued it becomes a nuisance by the principles of the common law, and the offender may be subjected to such fine or imprisonment as in the opinion of the jury will suppress the nuisance.

The instruction given is inconsistent with these views in confining the jury to the question whether the defendant habitually sold liquor to slaves, and excluding the enquiry whether it was habitually done without the permission of their owners or masters. As the judgment must be reversed for this error, we need only remark with regard to the refusal of the Court to compel direct answers from a witness deposing for the Commonwealth, that such matters must be very much within the discretion of the Judge who presides at the trial, and we cannot say that the discretion was abused in this case, or that the defendant was subjected to any injury by the failure of the Court to interpose.

But for the error in the instruction, the judgment is reversed, and the cause remanded for a new trial in conformity with this opinion.

Say & Beck for plaintiff; *Harlan*, Attorney General, for Commonwealth.

Young vs Dobyns.

ERROR TO THE MONTGOMERY CIRCUIT.

ASSUMPSIT.

Case 3.

Commission Merchants. Limitations. Presumptions.

JUDGE HISE delivered the opinion of the Court.

June 9.

The case
stated.

DOBYNS as surviving partner of a firm of forwarding and commission merchants engaged in business at Maysville Ky., sued Young in a Magistrates' Court in Montgomery co., to recover the amount of an account against him for money paid and advanced by plaintiff for defendant, for freight and charges on goods consigned to him, and for services rendered in receiving and forwarding the same to Young at his residence in Mt. Sterling. The warrant was issued and served on Young on the 3d September, 1849, and tried before the Magistrate in that month. The account was dated the 26th of October, 1847, of course one year, ten months, and seven days, had elapsed after the cause of action accrued before the suit was instituted. Young made defence before the justice, and relied upon the statute, which provides that suits on merchant's accounts for *goods, &c., sold and delivered*, or for articles charged in any store account, shall be commenced within twelve months after the cause of action hath accrued. The Justice gave judgment for Young, the defendant in the warrant. From which Dobyns the plaintiff, appealed to the Montgomery Circuit Court, in which the case was tried.

Both parties agreed to dispense with a jury, and that the facts and law of the case should be submitted to the Judge of said Court. Young's defence was non assumpsit, and non assumpsit within a year next preceding the commencement of the suit; after the proof had been heard, the Circuit Court rendered judgment against Young, and in favor of Dobyns for the sum of \$20 21 cents, (which is the amount of the account,) and

The judgment of
the Circuit
Court.

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DOBYNS.

The proof in the
case.

cost of suit. Young as plaintiff in error has brought the case before this Court.

The evidence taken establishes the following state of case: That the firm of Dobyns & Co., was established as forwarding and commission merchants in Maysville, Ky., in and during the year 1847, and Dobyns was the surviving partner of said firm at the time this suit was brought, the only other member of the firm, namely, H. Richardson, having in the mean time died, that at the date of the account, some articles or packages which had been shipped from Pittsburgh on the steamer Isaac Newton, marked as directed, to "Aquila Young, Mt. Sterling," "To the care of Jno. P. Dobyns & Co., Maysville," were received at the business house of Dobyns & Co., in Maysville, that on reception of these articles Dobyns & Co., paid certain charges thereon, amounting to \$13 38 cents, and to the steamer for freight \$3 11 cents, was also paid; the other items in the account for commission, drayage, advancing postage and interest, are proven to be correct, so that the claim of Dobyns & Co., to the amount of \$20 21 cents, is established by the testimony. It is not proven that Young directed or requested Dobyns & Co., to receive these articles for them, or to pay the charges and perform the service for which their account is rendered, nor is it proven that Dobyns & Co., were employed by Young generally or specially to receive goods for him, or to forward them to him, except as it may be presumed or inferred from the fact that the articles in question were consigned to them at Maysville, Ky., (they being established at that place as forwarding and commission merchants,) and directed to Young at Mount Sterling. It is proven in the case, that Dobyns & Co., forwarded the articles by a common carrier, from whom they took the usual receipt or bill of lading, requiring him to deliver them to Young at Mt. Sterling; that these articles were delivered to Young by the waggoner, H. Vankirk, and that all was done according to the general usage, custom, and practice, of forwarding and

commission merchants, in the transaction of business of like character.

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First question
presented.

There are two questions presented in this case of some importance and of general interest to a trading and commercial community. The first to be considered, is, whether a commission and forwarding merchant's account for money paid and advanced for freights, storage, drayage, &c., and for services rendered in receiving and forwarding goods, wares, and merchandize, is embraced within the provisions of the 5th section of the statute of limitations (*2d stat. law*, 1134,) which if plead would bar a recovery on merchant's accounts such as are therein specified, if suit was not prosecuted thereon within twelve months from their date or from the time they became due.

It is without hesitation given as the opinion of the Court that the accounts of commission and forwarding merchants for money advanced and services rendered, are not at all embraced by the provisions of the 5th section of the statute of limitations, above referred to, as is apparent from the language of that section, and its obvious import. The accounts therein specified, (suits upon which may be barred if not brought within a year,) are such as are created for *goods, wares, and merchandize, sold and delivered, or articles charged in any store account*. These expressions are definite and precise, and will not admit reasonably of any such construction as that contended for by Young's counsel. The account in this case is not for any of the things specified in the statute, but for money paid and advanced by Dobyns & Co., and for services performed by them for Young, consequently the 5th section of the said statute has no application, and this action of Dobyns is not barred thereby.

The accounts of commission and forwarding merchants for money advanced & services rendered, are not embraced by the 5th section of the statute of limitation (2 Statute Law, 1134) limiting actions upon merchants' accounts to one year.

The next question to be considered, is this: If a merchant engaged in the business of receiving and forwarding merchandize, &c., receives packages *consigned* to his care and marked with the name and place of residence of one supposed to be the owner, and thereupon

Second question
presented.

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he pays the freight, charges, storage, drayage, &c., and then delivers them to a responsible common carrier, to be carried to the person to whom, and the place to which they are directed by writing on the packages, taking from the carrier the usual receipt or bill of lading, in an action by such merchant against the person to whom the packages are directed and to whom they were delivered, for the money advanced and services performed, would the law authorize a recovery, and would the defendant in such action be liable though there should be no other proof given of the fact of his ownership of the packages, or of the employment by him of the merchant, than that arising from the circumstances of the consignment, the directions as written on such packages, and their delivery and reception accordingly, as shown from the proof in this case? It is the opinion of the Court that in such case the forwarding merchant might lawfully demand, and that the presumed owner of the goods would be bound to pay to him the reasonable amounts advanced, and reasonable compensation for the services rendered in receiving and forwarding the goods.

The consignment of goods evidenced by the directions on the packages to A. Y., "care of D. & Co.," &c., the delivery of them by the carrier to D. & Co., and the fact that the packages were on the usual route to the residence of A. Y., creates a presumption that A. Y. was the owner, and that the consignment was to D. & Co., by the consent and direction of A. Y.; and unless rebutted, creates a liability on A. Y. to pay advances, commissions, &c., to the consignee, D. G. & Co.

The consignment of the goods to Dobyns & Co., evidenced by the words on the packages, "To the care of Dobyns & Co.," their delivery to them from the steamboat Isaac Newton, the direction thereon to "Aquilla Young, at Mt. Sterling," the fact that they were forwarded in the customary way by a common carrier, to their direction, and delivered by him to the person to whom directed, to wit: Young himself, are circumstances from which a satisfactory presumption arises that Young was the owner of the packages, and that they were consigned to Dobyns & Co., as commission and forwarding merchants, with his consent or that of his agent who shipped them on the steamer Isaac Newton; and unless such presumption should be rebutted by proof on the part of the defence, Young should be held liable to pay the reasonable charges of the plaintiff in the warrant.

Wherefore the judgment of the Circuit Court is affirmed.

Hazlerigg for plaintiff; *Chiles* for defendant.

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vs
SUMMERS.

Hamilton vs Summers.

DEBT.

ERROR TO THE MONTGOMERY CIRCUIT.

Case 4.

Partnerships. Witness. Evidence.

JUDGE MARSHALL delivered the opinion of the Court.

June 9.

Case stated:

THIS action of debt was brought by Summers against Hamilton, as surviving partner of the firm of Hamilton and Sandford, upon a note for \$400, executed by Sandford in the partnership name, dated the 27th of April, 1848, and payable one day after date to Summers. Hamilton pleaded '*non est factum.*' And the case, upon the evidence, turned upon the question whether the note was executed for the benefit of the firm, in a partnership transaction, or for the private debt of Sandford to Summers, or for a loan to Sandford for his individual use, and known by Summers to be for that use.

The note itself, executed in the firm name by one of the firm, was, *prima facie*, obligatory upon both partners, and after proof of its having been so executed, it devolved upon the defendant to show to the satisfaction of the jury, that it was executed for the individual debt of Sandford, or loan to him for his private purposes, and not for the benefit of the firm or in its business, and that Summers knew, or had reason to know, that this was the case. The first instruction given by the Court, on motion of the defendant, conforms substantially to the principle just stated. But the second goes further, and is more favorable to the defendant than it should have been, in declaring that if Summers at the time Sandford borrowed the money and execu-

If a note be executed in the firm name by one of the firm, the presumption is that it was for the purposes of the firm, and upon that fact being denied, it devolves upon the person denying it to prove that it was not given for the purposes of the partnership.

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ted the note, believed it was borrowed for the purpose of paying off the private debts of Sandford or of his wife, the law was for the defendant.

That the payee of the note believed that money obtained for which the note was given in such case, was to be applied to the individual purposes of the partner obtaining it and giving the note, would not destroy the obligatory force of the note unless such was the fact.

" The belief of Summers, that the money was borrowed for such individual purpose, though it might prove an intention on his part to do an unjust act, would have no effect in law, unless the fact corresponded with his belief. And even if the money was avowedly borrowed for a private purpose, with the knowledge of Summers, still, if it was in fact used for the purposes of the firm, we are not prepared to say that the note executed in the firm name should not be binding upon all the partners.

Under the instructions referred to, none having been given for the plaintiff, the jury found against the plea of *non est factum*. And the defendant's motion for a new trial having been overruled, a judgment was rendered against him, for the reversal of which he prosecutes a writ of error. The only questions reserved on the trial, relate to the competency of witnesses, the admission and rejection of evidence, and the exclusion or refusal to exclude evidence. These questions we shall proceed very briefly to notice.

One who objects to the competency of a witness must show that incompetency or fail in excluding the witness.

1. Several of the plaintiff's witnesses stated that they or in some instances their wives, were legatees of Sandford; and they were objected to as incompetent on this ground. But the will was not produced, nor was the nature or amount of these legacies stated either by the witnesses objected to or any others, nor was there any proof showing that their legacies would be affected by the termination of this suit one way or the other. If it were conceded that the result of this suit would determine whether the estate of Sandford is liable for the whole or for only one-half of this note, still it is not shown that these legatees, or any of them, would receive more or less in either result, nor in fact is it shown that their legacies are not paid, or that if paid, there is any probability that they must be refunded to meet any part of this demand. And whatever might be the case

In this respect, we suppose the judgment in the present case would not be evidence between Hamilton and the executors of Sandford, either to preclude or establish the liability of one to the other, or to determine its extent.

It cannot be assumed, therefore, upon the mere fact that these witnesses are legatees of the deceased partner, that they have any certain interest in the result of the suit, or in the record as evidence. And as the party making the objection, should sustain it by proving such interest, and has failed to do so, there was no error in allowing the witnesses to testify.

2. The defendant proved by two witnesses, conversations between himself and the plaintiff, relating to the note sued on, and in which the defendant denied his liability to pay it, and said it was not for a partnership debt, which was not contradicted by Summers. These conversations were excluded by the Court on motion of the plaintiff, on the ground that they had occurred in the absence of Sandford, who was then in fact dead. But it was not against Sandford but against Summers the plaintiff, that the evidence was offered. And it was not the statement of Hamilton in his own favor that constituted the evidence, but the answer of Summers or his failure to answer, from which it was the province of the jury to draw the appropriate inference, according to their own judgment. The jury might have considered the evidence as sufficient to establish an indirect admission of the fact asserted by Hamilton. And as in this suit between Summers and Hamilton, a direct admission of the same fact by the former would unquestionably be evidence against him, so is his indirect admission. A judgment for the defendant founded upon the direct admission of Summers, would have precisely the same effect upon the liability of Sanford's estate as one founded upon the indirect admission. But such a judgment would not in either case affect the question of contribution between Hamilton and Sandford's executors, should they be compelled to pay the

In a suit against a surviving partner his admissions direct or indirect, are evidence against him though the judgment would not be evidence in a controversy with the representatives of the deceased partner upon the question of contribution.

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whole debt. We are of opinion therefore, that the Court erred in excluding this evidence. But there was no error in rejecting the statements of Sandford in the absence of Summers.

The admissions of one partner made after the dissolution of the partnership, is not evidence against the other partner: (*Daniel vs Nelson*, 10 B. Monroe, 318.)

3. The plaintiff proved by two witnesses, statements made by Sandford on his death bed, in the absence of both Hamilton and Summers, to the effect, that he had sold out his interest in the firm to Hamilton, who was to pay the firm debts, and that all notes in the firm name were for firm debts, except one which was designated, and was not the one now in question. Without noticing other objections, it is sufficient to say that this statement upon its face was made after a dissolution of the firm. And in the case of *Daniel vs Nelson*, (10 B. Monroe, 318,) this Court upon full consideration of the question, and in accordance with its previous decisions decided that the admissions of one partner after dissolution are not evidence against the other. We are of opinion therefore, that this evidence was inadmissible, and should have been excluded on the motion of the defendant for that purpose.

Evidence not incompetent when offered, but which for its competency depended upon other proof which was not made should be excluded upon request of the party vs whom it was offered, but if made competent there is no error in letting it go to the jury.

4. The plaintiff read in evidence three letters in the hand-writing of Sandford signed in the name of the firm, addressed to B. F. Thomas & Co., at Maysville, all dated and post-marked at Sharpsburg, the town in which the firm had a store, and each purporting to enclose a particular sum of money, (proved by the postmaster to have been enclosed in it,) and directing payment of a note of the firm payable in Bank. The first of these letters bears date on the same day on which the note sued on is dated, and the others on the second and fifth days thereafter. The object of this evidence was, as is presumed, to authorize the inference that the money for which the note in suit was executed, was appropriated to the payment of a firm debt. But it is not proved that any money was advanced by Summers at the date of the note, or that a loan from him was necessary for the purposes of the firm, or that the firm actually owed any such debt at bank as that referred to

in the letters, or that the money enclosed was applied to the payment of any debt actually due by it, except so far as these facts, or some of them, may be established by the note and the letters themselves, or may be inferred from the failure of the defendant to produce upon notice, the cash book of the firm. The presumption necessarily arises that the persons from or through whom the plaintiff obtained possession of the letters could have proved or explained the facts referred to in them; but it is not even proved that there was any such firm as that addressed, except by the letters themselves. In the absence of all explanatory and auxiliary evidence, we should greatly doubt whether the mere coincidence between the dates of these letters and the note sued on, would furnish any rational ground of inferring that the money for which the note was given, was applied to partnership purposes. But even if it did not, there was no error in admitting the letters when offered, because other evidence might have been offered in corroboration of them; and we cannot say that the defendants failure to produce the cash book, does not furnish some corroboration, and afford a ground of inference against him. But there was no motion to exclude the evidence.

The objections taken by Summers to the time and manner of perfecting the bill of exceptions, are sufficiently met by the consent order of the previous term.

And for the errors which have been noticed, the judgment is reversed, and the cause remanded for a new trial in conformity with this opinion.

Hamilton & French for plaintiff; *Hazlerigg* for defendant.

CHANCERY.

Blackburn vs Collins.

Case 5.

ERROR TO THE WOODFORD CIRCUIT.

Execution sales. Redemption. Consideration.

June 9.

JUDGE CRENSHAW delivered the opinion of the Court.

Case stated.

EDWARD M. BLACKBURN, having recovered a judgment against Vardeman Collins in the Franklin Circuit Court, for the sum of \$1000, besides interest and costs, caused an execution to issue thereon, which was levied on two slaves, Ned and Stephen, and was stayed by Blackburn, 17th January, 1842.

On the said 17th of January, 1842, a *venditioni exponas* was issued, and on the 14th day of February thereafter, said slaves were exposed to sale by the Sheriff, and George E. Blackburn, a son of said Edward, became the purchaser at the sum of \$800. After deducting sheriff's commission, there remained \$784 01, to be applied as a credit upon the execution.

On the 17th day of February, 1842, another execution issued on said judgment, indorsed with a credit of said sum of \$784 01. This execution was levied upon some corn, hogs, and other personal property—sold by the sheriff, and purchased by George E. Blackburn at the price of \$61 85, and, after deducting sheriff's commission, there remained of this sale, 58 76, as a credit on the execution. The sheriff then returned the execution, indorsed, in substance,—no property found to satisfy the remainder.

In a short time after the purchase of the slaves, Edward M. Blackburn took possession of one of them, and the other remained in the possession of Collins until two or three years before the commencement of this suit.

Collins, in March, 1849, filed his bill against Edward M. Blackburn, alleging that the negroes were worth

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\$1200 at the time of the sale; that George E. Blackburn was the general agent of his father; that he had been authorized by his father to manage the execution, and to buy said slaves for him, and to do every thing he might think proper, in reference to said claim; that George purchased the slaves, not for himself, but for his father, and as his agent; that he was hard pressed at the time, and it was agreed between George and himself, at and before the sale, that the negroes should stand as a security for the debt, and that complainant might redeem them, by paying whatever might be due on the judgment at the time of redemption, including said sum of \$784 01, the nett sum for which the slaves had been sold; and that, in that event, he was to be allowed for the services of the slaves; that since the sale, Edward M. Blackburn frequently ratified said contract and promise of George, and recognized the complainant's right to redeem the negroes.

The bill also alleges, that the complainant had paid an order drawn upon him by defendant for \$30, which ought to have been credited on the note upon which the judgment was recovered, and that he had paid a large amount—"something like \$500"—besides what was made by the sale of the negroes. An adjustment of accounts is asked; hire for the slaves is claimed; an offer made to pay the balance of the judgment, if any should remain, after the proper credits should be entered; a redemption of the slaves is prayed for, and \$400 are alleged to be brought into Court, which complainant states, is as much as he owes, "including the amount for which said boys sold."

An amended bill is filed, stating, in substance, that E. M. Blackburn holds several notes on complainant for the hire of the negro which had remained in his possession for some years after the sale made by the sheriff; that these notes were executed at the desire, and merely to please defendant, and without any consideration—defendant saying at the time they were given, that complainant was never to pay them; that

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he would never call upon him to pay them; that he never had done so, and that complainant had never paid one cent on them; that, when one of the notes was executed, defendant immediately turned it over, and entered a credit on the back of it for the full amount, or, marked it paid or discharged, when nothing in fact had been paid; that defendant had told complainant, he would mark other notes paid, and afterwards said he had done it—these notes are prayed to be delivered up to be cancelled.

The defendant, in his answers, denies that the negroes were worth at the time of the sale \$1200, and says they were sold for their value, he denies that Geo. E. Blackburn was his general agent, does not believe that he made any agreement with complainant to allow him to redeem, and states that, if he did make such agreement, it was without authority.

He then states in his answer to the amended bill, "that neither he, nor any authorized agent of his ever made any promise to complainant, that he might redeem, except upon condition of his paying the full amount of his debt without regard to the annual value of the slaves." And he says he "always told complainant he might have the negroes by paying him what he gave for them, and also paying him the balance of his execution, and that this is the only redemption he ever promised to him." The answer further states that one of the negroes, by the earnest solicitation of the complainant, was left with him on hire for several years, and that complainant executed his notes for the annual hire; that no certain calculation was made, that complainant would pay the notes for hire; that, from time to time, complainant promised to pay the debt, and the notes were used "to get the balance of the debt." Blackburn says he put no value upon the notes; that it is probable he may have given up to complainant the first and second notes; professes to file one of them, and says he does not know what has become of the other.

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Two depositions only, are taken in the cause; the deposition of Young states a conversation between himself and the defendant, at defendant's house, which took place a short time before this suit was brought, in which the defendant said, in reply to a statement of the witness that Collins was to meet him there that day to see something about the negroes, that, if that was the business of the witness, he need not look for him, for, that Collins had been promising from time to time, for two or three years, to come for the purpose of redeeming the two negroes. He proved also that the negroes were worth from one to one hundred and twenty dollars per annum, each. The other deposition is that of Morris, the sheriff, who made the sale. He states that, at the time of the sale and purchase of the negroes, George E. Blackburn told him that he purchased them as the agent of his father, and with the understanding that Collins was to redeem them; that Collins, being in embarrassed circumstances, the object was to secure his father's debt. Both witnesses prove that the slaves, at the time of the sale, were worth \$1200, and Morris states that each negro was worth per annum \$100.

The Court below charged the defendant with the hire of the negroes, and with \$30 which had been paid upon his order to Reddin, and brought the defendant in debt to the complainant the sum of \$52; decreed against him this sum, and directed him to surrender the slaves, Ned and Stephen, to complainant.

Decree of the
Circuit Court.

We admit that, as a general rule, where an agreement is made between two persons, before a sale is made by an officer, that the one whose property is to be sold, and to be bought by the other, shall have the privilege of redeeming it, that he will be permitted by the Chancellor to do so. But in the cases where this has been permitted to be done, there was either some valid consideration for the promise of the purchaser to allow a redemption, or, some injury resulting to the party whose property was sold, in consequence of the previous agreement. Conceding in this case, that

A promise by a plaintiff in an execution that defendant may redeem property sold under execution upon payment of the price when such promise has no other consideration to support it than the kind feeling of the party, if not known to the bidders, and has no influence upon the sale of the property, is not

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such promise as
the chancellor
can enforce.

George E. Blackburn had authority from his father to make just such a promise and agreement as are alleged, we are led to enquire, what could have induced them? The father, Edward M. Blackburn, had his execution for \$1000, besides interest and costs, levied upon the slaves; the sheriff was about to proceed with the sale; Blackburn's claim was safe, or thought to be safe to the extent of the value of the negroes; the complainant was in embarrassed circumstances; he promised to pay no interest beyond what was already accruing upon the execution, and was unable to comply, if he had made such promises; what then, constituted the consideration of the agreement to purchase the slaves, and allow their redemption? We can imagine none which would be obligatory, and can perceive no motive for such an agreement on the part of George or his father, but their feelings of kindness for the complainant.

No allegation is made that the sale was not a fair one; it does not appear that any other person was induced not to attend the sale and bid for the slaves, or, that any person present was prevented from bidding, or, that any injury whatever accrued to the complainant, in consequence of the agreement. We are at a loss, therefore, to perceive upon what valid ground a right to redeem the slaves can be based.

But, did George E. Blackburn have any authority from his father to make an agreement with Collins for the redemption of the negroes? There is no proof that he had, and the answers of the defendant to the bills, though not as full and explicit as they might and ought to have been, substantially, as we think, deny such authority. Still, Edward M. Blackburn, after sanctioning the purchase, would be bound by any agreement, binding in law, made by his son at, and before the sale. But we think it questionable, whether any agreement at all, valid or invalid, has been established. No interview is shown to have taken place, either between George E. Blackburn and Collins, or between E. M. Blackburn and Collins. Indeed, it is not alleged, nor

If an agreement on the part of plaintiff in an execution to give a defendant in execution the privilege of redeeming be relied upon and a redemption insisted upon by the defendant in the execution, it must be admitted or proved based upon good consideration.

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pretended, that any agreement for the redemption of the slaves was made by E. M. Blackburn and Collins. And the only means furnished, for arriving at the conclusion that any such agreement was made between George and Collins, is what is proven by Morris, the Sheriff, to have occurred between him and George at, before, and after the sale. Morris states that George told him "he purchased the negroes as the agent of his father," and that "he purchased them with the *understanding* that Collins was to redeem them; that the object of the sale, Collins being in embarrassed circumstances, was to secure his father's debt." This witness further proves that, several days before the sale, "he called on George to know who would act for his father, who was in the South; and that George replied, he would, that there was an *understanding* that Collins was to have the privilege of redeeming the negroes, and he would purchase them;" but "George also stated in the same conversation on the subject, that if the negroes sold for the amount of the debt, he did not intend to buy them."

Is it not manifest from this proof, that there was no absolute undertaking on the part of George to purchase the negroes? The debtor, therefore, could not have been deceived, and lulled into security, and prevented by the undertaking of George from looking out for other bidders. But, between whom, was this *understanding* that Collins was to redeem the negroes? and what were the terms, and when was it to be done? Was it between George and Collins, and was the redemption to depend upon the payment of the whole debt, or only what had been bid for the negroes, or between Collins and E. M. Blackburn? The Sheriff says, that "he called on George to know who would act for his father, who was in the South, and George replied he would; that there *was an 'understanding'* that Collins was to have the privilege of redeeming the negroes. From this language, it might be inferred that the *understanding* was between Collins and E. M. Blackburn, and not

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with Collins and George; but it is not pretended by Collins in his bills, that he had ever made any arrangement or agreement upon the subject of the redemption of the slaves, with E. M. Blackburn. The conversation between the Sheriff and George had occurred some nine years before the deposition of the Sheriff was taken, and it would be very hard to recollect all that might have taken place at the time, or the precise language which was used, and a very slight variance from the words used, might produce an important difference in the meaning to be attached to them. From the whole record, we have come to the conclusion, that there was no other understanding or agreement, than a mere naked promise on the part of George E. Blackburn that, if he should purchase the negroes, Collins might have them again by paying the debt, interest, and costs. The purchase was not made, and the bill does not allege that it was made, for Collins, but for E. M. Blackburn. After the purchase, the negroes were his—held, not in trust for Collins, or under a *quasi* mortgage—but held as his own absolute property, subject only to a mere gratuitous promise by George, and E. M. Blackburn also, that Collins should have the negroes by discharging the debt.

We are of opinion that no importance ought to be attached to the fact, that one of the negroes was permitted by Blackburn to remain in the possession of Collins for several years after the purchase, and that he took notes for his hire with no calculation of their being paid. Blackburn seems to have had no desire to keep the negroes, if he could get the amount of his claim. Collins was hard run—his negroes had been sold, and we can perceive that kindness alone might have been a sufficient inducement to allow one of the negroes to remain. He acknowledges he told complainant he might have the negroes again, by paying his debt. If it was really a *redemption* which was spoken of between the parties, then nothing would have to be paid to Blackburn, but the amount bid for the negroes

and interest; but this transaction shows to us that there was a mere promise to let Collins have his negroes again by paying the whole debt—this is not a *redemption*, but a repurchase—in common parlance, called a *redemption*, but in fact, a repurchase of the slaves. Some importance is attached by counsel to the fact that Blackburn got the bill of sale from the Sheriff to bring Collins to a settlement. We have no doubt that Blackburn, having made a promise to Collins to let him have the negroes again, was anxious that the matter should be closed. If Collins intended to get the negroes again, it was natural that Blackburn should wish it done without further delay.

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Collins, in his original bill, goes into Court under the impression that he owes Blackburn the sum of \$400, and professes to bring that sum into Court, alleging that "it is as much as he owes." And this, too, after charging that he had paid upon the debt, some \$530, besides what was made by the sale of the negroes—not a dollar of which is attempted to be proved—and all is denied, except the sum of \$30 paid to Reddin upon the order of Blackburn. And yet he obtains a decree against Blackburn for the sum of \$52.

No time was fixed for the alleged redemption to be made. Seven years elapse without any assertion of right, or attempt by Collins to redeem. Whatever understanding there was between the parties was in parol, depending upon frail memory alone. How long, even under a valid and binding agreement, existing in parol only, shall a man be allowed to sleep upon his rights? Would not five years be reasonable, and as long as a man should be suffered to procrastinate his remedy in such a case?

And if no time be fixed in which such privilege is to be exercised, which exists if at all only in parol, should it not be demanded within five years—*Quere?*

We have given an attentive examination to the authorities referred to by the counsel of the appellee, and are of opinion that, although those cases are, in some respects, analogous to the case under consideration, there is a material difference in principle between them.

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It results, from the foregoing views, that the Circuit Court erred in rendering a decree, directing Blackburn to surrender the slaves, Ned and Stephen, to Collins, and to pay him the sum of \$52. But Collins has shown himself entitled to a credit for the sum of \$30, as paid 28th May, 1841. And it being our opinion that the several notes given by Collins to Blackburn for the hire of the negro, which was suffered to remain with him for a time, were never intended to be collected, and that the services of the negro were designed as a gratuity, and so understood by Collins, would it not be unjust in Blackburn to coerce payment of the notes?

Blackburn had a right to the hire of this slave, but he had a right to give his services to complainant; and, although he annually took the notes of Collins for the hire, we are of opinion from the bills and answers upon this subject, that it was the understanding between the parties at the time, that the services of the boy were a gratuity.

Blackburn says, "it is very probable he may have given up the first and second notes, or may have agreed to cancel them; that he put no value upon them, and has been able to find but one of them; that one he professes to file; that he will not state with any certainty what has become of the other two; that they may have been given up to complainant, or been cancelled by himself by indorsement. He has manifested no disposition to collect these notes, and we think it would be contrary to equity and good morals for him to attempt to do so.

The decree of the Circuit Court is reversed, and the cause remanded, that a decree may be rendered, cancelling said notes for hire, and directing a credit to be entered upon the judgment of Blackburn for the sum of \$30, as paid 28th of May, 1841, and perpetually injoining him from the collection of so much of his judgment, and dismissing the bill as to all other claims.

Collins, having shown himself entitled to relief, will have a right to his costs in the Court below.

Hewitt and Lindsey for Plaintiff; *Reed, Smith, Good-
be, and Harlan* for defendant.

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March vs Commonwealth.

APPEAL FROM THE LEXINGTON CITY COURT:

By-Laws. Lexington City Court.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

The appellant was indicted in the Lexington City Court, for an offence alleged to have been committed by him in the city of Lexington. The indictment contains two counts. In the first he is charged with having committed an assault and battery on the person of a female. The second count is for an assault and battery on the person of the same female; with an intent to commit a rape.

The jury found him guilty of an assault, and assessed against him, a fine of one thousand dollars. A motion was made in arrest of judgment, upon the ground that the proceeding should have been by warrant in the name of the city, and not by indictment, and that the fine assessed should not have exceeded the sum of one hundred dollars. The motion in arrest of judgment was overruled, and the defendant has appealed to this Court.

It is assigned for error, that the Court below, erred, in overruling the appellant's motion to arrest the judgment. The argument in support of this position is, that, by an ordinance of the city of Lexington, a person who commits a breach of the peace within the city, is subject to be punished by a fine not exceeding one hundred dollars, to be assessed by a jury; that the offence of which the defendant was found guilty is a mere breach of the peace and nothing more, and that as the

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offence is punishable under a city ordinance, no other punishment can be inflicted than that which the ordinance provides, the adoption of the ordinance being a virtual repeal of all laws imposing another or a different penalty.

Provisions of the act of 1840, in respect to the city of Louisville and other cities in Kentucky: (3 Stat. Law, 571.)

The amendatory act of 1842: (3 Stat. Law, 244.)

To enable us to test the merits of this argument, it becomes necessary to notice several legislative provisions upon the subject, as upon a correct construction of them, a solution of the question involved in it, mainly depends.

By an act passed in February, 1840, (3 *Vol. Statute Laws*, 571,) it was enacted, that "all the ordinances of the city of Louisville made, or to be made, not in violation of the constitution of this, or of the United States, shall be held to be valid and in full force, as though there was no legislative act upon the subject; and in suits or prosecutions under such ordinances, the fines and penalties provided for shall be enforced, notwithstanding the existence of such legislative act.

That provision was contained in the first section of the act; and in the fifth section of the same act, it was enacted, "that the provisions of the first section of this act shall extend to the city of Maysville, and to all other cities in the Commonwealth, in the same manner as if Maysville and the other cities had been named in conjunction with Louisville; and when the charter of the city of Louisville, or any other city vests powers in city authorities to regulate any subject by ordinance, on which the Legislature may have passed a law, the ordinance so passed shall be enforced in all respects as if no legislative act had been passed on the subject."

The act of 1845: (Session Acts of 1844-5, p. 196.)

In 1842, an act was passed, entitled, "an act to reduce into one, and digest and amend the acts, and amendatory acts, incorporating the city of Lexington." (*Session acts*. 1841, 1842, page 244.) The following sections of the act have a bearing upon the question under consideration:

"Sec. 41. The Mayor and Councilmen shall have full power to pass all needful ordinances and by-laws for carrying into effect all the powers herein granted,

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and executing all the provisions of this charter, with suitable penalties for the infraction of the same, not exceeding fifty dollars, except in cases of disturbances of religious worship, riots, and breaches of the peace, where the penalty may be one hundred dollars.

"Sec. 71. All penalties for breaches of the ordinances and by-laws of the city, shall be sued for by warrant in the name of the city, and be for its use.

"Sec. 63. The City Court shall have exclusive original jurisdiction in all prosecutions for violations of the ordinances of said city.

"Sec. 65. Said Court shall have concurrent jurisdiction with the Fayette Circuit Court in prosecutions by indictment, or presentment, for breaches of the peace, nuisances, and violations of the statutes against gaming, occurring in the city of Lexington; and may cause to be summoned a grand jury to inquire into such of the offences cognizable in said Court, as may be indictable or presentable; and proceedings shall be instituted and prosecuted in such cases in the same way that proceedings are had in the Circuit Court in similar cases, and the verdicts and judgments in such cases, shall be of the same character, and for the same amounts with those rendered in similar cases in the Circuit Court. But any person prosecuted to conviction, or acquitted, for a violation of the ordinances of the city, shall not be afterwards prosecuted by indictment or presentment, for the same offence, and *vice versa*."

By an act passed in 1845, (*Session acts*, 1844, 1845, page 196,) exclusive jurisdiction of all pleas of the Commonwealth arising within the limits of the city of Lexington, except cases of felony, was vested in the City Court. Act of 1844-5.

In 1842, the Mayor and Board of Councilmen of the city of Lexington passed an ordinance, that any free person who shall commit a riot or breach of the peace, within the city, shall, for every such offence forfeit and pay to the city, a sum not exceeding one hundred dollars, to be assessed by a jury.

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No bill of exceptions was filed in the Court below, nor is the above ordinance made a part of the record; it is therefore contended, that this Court cannot notice its existence, and consequently that the basis of the appellant's objection to the legality of the proceedings in the City Court is wholly destroyed. This preliminary question must be first disposed of,

Superior Courts will not, ex officio, take notice of customs, laws or proceedings of inferior Courts of limited jurisdiction unless when revising their judgments, when justice requires they should notice them.

There are some things that Courts are bound to notice judicially. The Superior Courts however, will not *ex officio* take notice of the customs, laws, or proceedings of inferior Courts of limited jurisdiction, unless when reviewing their judgments upon a writ of error, when for the purposes of justice they must necessarily notice them; (1 *Volume Chitty's pleadings*, 252.) Now in deciding in this case, whether the judgment of the City Court is unsustained by law, and erroneous, it is indispensibly necessary to notice the by-laws, and ordinances of the city, otherwise the Court will be unable to give a correct opinion upon the subject, and the judgment of the Court, although it should not be sanctioned by the laws under which the Court acted, cannot be reversed.

In considering therefore, the argument against the propriety and correctness of the judgment of the City Court, and determining the question presented by it, we shall notice the foregoing city ordinance, and regard it as constituting a part of the law of that Court. Does this city ordinance provide a penalty for the same offence, of which the appellant was found guilty? If so, does the existence of the ordinance operate as a repeal, or supercede the law of the land prescribing a different mode of proceeding for the punishment of the same offence, or do both laws exist in full force, subject only to the limitation, that a conviction or acquittal under one of them shall preclude a proceeding against the same person, for the same offence under the other?

A breach of the peace is incidental to the commission of every assault and battery. Although therefore an assault and battery includes more than a mere breach

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of the peace, because it endangers personal security, yet being a breach of the peace, it may be punished as such, and should be regarded as comprehended within the true import of the city ordinance. Conceding that the ordinance embraces assaults and provides a penalty for their commission as breaches of the peace, the inquiry arises, does it have the effect attributed to it, of superseding within the city limits, the law of the state upon the same subject.

A power vested by legislation in a city corporation to make by-laws for its own government, and the regulation of its own police, cannot be construed as imparting to it, the power to repeal the laws in force, or to supercede their operation by any of its ordinances. Such power if not expressly conferred, cannot arise by mere implication, unless the exercise of the power given, be inconsistent with the previous law, and does necessarily operate as its repeal *pro tanto*. Nor can the presumption be indulged, that the Legislature intended that an ordinance passed by the city, should be superior to, and take the place of, the general law of the State upon the same subject.

A power vested by the Legislature in a city corporation to make by laws for its government, and the regulation of its own police—cannot be considered as imparting by implication a power to repeal the laws of the State, or supersede them by any of its ordinances.

As many acts, which if committed out of the limits of the corporation, would be in a great degree, or wholly harmless, and therefore not regarded as public offences by the law of the State, but which occurring within the city, wear a different aspect, and may be inconsistent with the public safety, or with good order; and as others which are denounced by law as public offences, might, if committed within the limits of the city be also an offence peculiar to the city, an authority in the corporation to make by-laws inflicting penalties upon offenders in such cases, is indispensibly necessary for the security of its inhabitants, and the preservation of good order. As, however, a doubt may have existed whether a city could by its ordinance inflict a different penalty for an offence punishable by law, from that which the law itself imposed, the passage of the act of 1840 may have been deemed necessary for the solution

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of that doubt. This act by declaring that when a city charter vests powers in the city authorities to regulate any subject by ordinance, on which the Legislature may have passed a law, the ordinance so passed shall be enforced in all respects as if no legislative act had passed upon the subject, clearly manifested the intention of the Legislature to be, to make such an ordinance valid and enforceable, whether at its passage the law in force upon the same subject, was the common law or a legislative enactment. But although it in effect declares that the ordinance shall be enforced, as if there were no other law upon the same subject, yet it does not declare that its passage shall operate as a repeal of the previous law, nor do we think that the Legislature intended to impart to it such an effect.

If, however, any doubt exists upon this point, considering the act of 1840 by itself, that doubt is removed, so far as the city of Lexington is concerned, by the act of 1842, reducing into one, the acts and amendatory acts incorporating the city of Lexington. The 65th section of that act, after declaring that the City Court shall have concurrent jurisdiction with the Fayette Circuit Court in prosecutions by indictment or presentment, for breaches of the peace, nuisances, and violations of the statutes against gaming, occurring in the city of Lexington, and that proceedings shall be instituted and prosecuted in such cases in the same way that proceedings are had in the Circuit Court in similar cases, and that the verdicts and judgments shall be of the same character, and for the same amounts with those rendered in similar cases in the Circuit Court; expressly provides, that any person prosecuted to conviction or acquittal for a violation of the ordinances of the city, shall not be afterwards prosecuted by indictment or presentment for the same offence, and *vice versa*. It is thus apparent, that the Legislature considered the previous law as still remaining in full force, notwithstanding the passage of a city ordinance upon the same subject. This legislative construction would be enti-

tioned to great weight in determining the meaning and effect of the act of 1840, if the case had to depend upon the provisions of that act alone. We however regard the act of 1842, not only as indicating a legislative construction of the effect of a city ordinance passed in pursuance of an express power vested by the Legislature in the city authorities, upon the law previously in force upon the same subject, but also as declaring, by necessary implication, that the previous law shall continue in full force, notwithstanding the passage of the city ordinance regulating the same subject.

The result therefore is, that if the city ordinance provides a penalty for the commission of an assault and battery within the city, it does not repeal or supercede the law previously in force upon the same subject. Either law may be enforced, but a conviction under one, is a bar to a proceeding under the other. A proceeding to enforce the city ordinance must be by warrant in the name of the city; but a proceeding to enforce the general law must be by presentment or indictment. In the former case the amount of the judgment is determined by the city ordinance; in the latter it is regulated by the law of the land, as if no ordinance had been passed upon the subject.

It follows according to the views here expressed that the City Court did not err in overruling the motion of the appellant to arrest the judgment.

Wherefore the judgment is affirmed.

Robertson for plaintiff; *Harlan, Atto. Gen.*, for Commonwealth.

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The passage of an ordinance by the city of Lexington, authorizing a fine of 100 dollars for a breach of the peace, did not repeal the common law, which authorizes a fine at the discretion of a jury by the authority of the City Court.

EJECTMENT.

Ratcliff vs Trimble.**Case 7.**

APPEAL FROM THE PIKE CIRCUIT.

*Clerk's Evidence. Instructions. Fraud.**June 13.*

JUDGE MARSHALL delivered the opinion of the Court.

THIS case was formerly before the Court, and we refer to the opinion reported in *9th B. Monroe*, 511, for a general statement of the facts and principles as then presented. It will be seen from that opinion that the action was brought on the demise of Trimble, against Richard Ratcliff, Silas Ratcliff, and others, to recover land claimed by the lessor under a sheriff's sale and deed, made in virtue of a judgment and execution against Silas Ratcliff, that the defendants relied upon a prior deed from S. Ratcliff to his son Richard, and that the principal question in the case, was, whether this deed was or was not fraudulent and void as against the creditors of S. Ratcliff. This upon the last trial was the only question, so far as the merits were concerned, and is the subject of the instructions given and refused. Several incidental questions were however, made in the progress of the trial, some of which it is necessary to notice.

An official copy of a record, certified by a clerk, is competent evidence for him in any suit to which he is a party.

The plaintiff in making out his title offered the record of the judgment and proceedings of the Floyd Circuit Court, under which the lessor had purchased the land, and received his deed; which was objected to on the ground that it was certified by the lessor himself as Clerk of that Court. But it was admitted as evidence. And it is now contended that this was erroneous, as being in violation of the rule, that a man shall not make evidence for himself. It is not shown, however, that such a case has ever been decided to be subject to the application of the rule, and we are satisfied that it is not. The official character of the act, the duty and

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responsibilities of the Clerk, the publicity and notoriety of the proceedings appearing of record and certified by him, the penal consequences of a false certificate, and facility of detection and exposure, are considerations which preclude the application of the rule to a record certified by him, and it may be used as evidence by him as well as by any other person.

When the plaintiff had made out his chain of title, and proved that the defendants were in possession on the 2d of February, 1844, the declaration and notice in the action having been served on them on the 14th of the same month; the defendants moved for instructions as in case of a non-suit, and the motion having been overruled, it is now contended that it should have been granted on two grounds. 1st, because there was no proof of possession by the defendants when the declaration was served; and 2d, because the sheriff's deed was not indented as required by the act of 1798; (*Stat. Law*, 1463.) The record does not show the specific grounds on which the motion was made. But we do not consider either of those now urged as sufficient. As to the first, the jury had a right to infer, in the absence of other evidence, that the defendants being in possession on the 2d of February, remained in possession until the 14th. From the nature of the fact the presumption of continuance (to a reasonable extent,) arises, rather than the presumption of abandonment or cessation of the possession. And besides the inference of a continued possession is amply authorized, if not indeed fully established, by the evidence subsequently introduced.

A defendant is ejectment tenant in possession being shown to have been in possession on the 2d day of the month, the jury may where there is no evidence to the contrary presume that his possession was continued until the 14th of the same month.

As to the second ground, it might be sufficient to say that there is no evidence in the record that the deed was not indented. It was read without objection. Upon its face it is called an Indenture. It appears in the transcript before us, just as we presume it would appear if it were actually indented. And its not being indented is not even alleged in the motion for a non-suit. Under these circumstances, we should, if it were neces-

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It is no objection to the admissibility of Sheriff's or other deed of conveyance at this day that it is not indented. The practice of indenting for identification is now obsolete in Kentucky.

sary to sustain the judgment, presume that it was indented. But unless for want of being indented, it was absolutely void, it was too late after admitting it as evidence without objection, to move for a non-suit because it was not indented. If it was not void, it passed the title of the defendant in the execution, and being in evidence, it proved that title to be in the lessor, which was its proper office. But we think the objection would be unavailing in any form, and at any stage of the cause.

The practice of separating the different parts, or copies, of a deed or indenture by cutting them apart in an indented or curved line, so that the identity and genuineness of the parts in the hands of the grantor and grantee, might at any time be tested by bringing them together, and thus determining whether they had been written on the same piece of paper or parchment, was formerly useful and necessary to prevent imposition, and to test the verity of the instrument. It was therefore regarded as essential in important transactions, and is prescribed by the old statutes regulating the modes of conveying land. But this from having long since ceased to be necessary or useful, has been dropped in general practice, and was omitted in the general statutes of conveyancing, as early as 1785; and it has become wholly obsolete in this State. The act of 1798 to reduce into one the acts subjecting lands to the payment of debts (*Stat. Law 1463*), directs in its 8th section, that "in all sales of land under execution, the sheriff, or other officer, shall convey the same by deed indented, sealed and recorded, as the law directs for other conveyances of land," &c. This provision was probably copied from some of the previous acts referred to in the title, and the word indented may have been inadvertently inserted without reference to its having been dispensed with in ordinary conveyances. But however this may be, it is obvious that the Legislature intended by this provision to require no other form in the execution of a sheriff's deed, than the law directs for other con-

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veyances of land. And as the law does not and did not at the date of this statute, direct or require an ordinary conveyance to be indented, we are of opinion that the sheriff's deed if good in other respects, is not vitiated by the omission of the useless and purely formal act of indenting it. We know too, that in this respect the deeds of sheriff's have for many years conformed to the ordinary modes of conveyance, and that much litigation and confusion and loss would ensue from a decision that such deeds are ineffectual if not actually indented. And we feel authorized and bound to give greater effect to that part of the statutory direction which refers to the ordinary laws of conveyancing, than to the particular word *indented*, which is repugnant to the more important part of the provision.

It appeared upon the last trial, that Richard Ratcliff had actually paid to his father the three hundred dollars named in the deed as the consideration of the land, and also \$150, for the negro man referred to in the former opinion, and that these sums were paid by the grantor to his creditors. These facts were admitted for the purpose of avoiding a continuance moved for, on account of the absence of a witness who it was stated would prove them. But the admission was used on the trial, and of course removed any inference or question as to the non-payment of the consideration.

Facts admitted on the trial of this case, on the last trial not appearing on the former record before this Court.

Upon the assumption made in the former opinion, and fully authorized by the evidence on the first trial, that the property conveyed was worth at least \$2000, the payment of the small consideration of \$300, and its appropriation to the debts of the grantor, might have been entitled to little influence in rebutting the inference of fraud arising from other circumstances then and now appearing in the case. But while it may still be assumed that the land itself was worth \$2000, or more, several witnesses deposed on the last trial, that encumbered as the land was with law suits, and a judgment in ejectment, it was worth but little, and not more than three hundred dollars. There was no such evi-

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dence on the former trial. And the reasoning and conclusions of the former opinion, apply to a case in which the inadequacy of price was gross and palpable. If, at the time of the conveyance now in question, the land was so encumbered by suits and judgment, as that, in common estimation, the title and interest of the grantor was regarded as worth no more than three or four hundred dollars, or that it might have been fairly considered by S. Ratcliff and his son as of no greater value, the conveyance to the son, at the price of three hundred dollars, actually paid to the grantor, and by him appropriated to the payment of his own debts, would, so far as these circumstances are concerned, be subject to but slight, if any, inference of fraud—even though there was no visible change of the possession of the land, and the grantor still derived his support from it.

It seems that the one hundred acres of land embraced in this deed, being included in a patent to John Graham, was by him sold and conveyed to S. Ratcliff about the year 1814, by deed, with a covenant to refund the price of three hundred dollars in case of loss, &c. And that the same land being also included in two adjoining older patents to J. Madison a separate action was brought about the year 1815, upon each of these patents, against Ratcliff and others—that in the action under the patent for 1850 acres, the plaintiff being unable to make out a title derived from the patentee, a verdict and judgment were rendered for the defendants, and in the other action on the patent for 1300 acres, a judgment was confessed by one of the tenants, who was made defendant for all. No further action seems to have been brought upon the first named patent. And the possession of Ratcliff having continued till 1835, under the junior patent, his right of possession was then probably perfected by time against the patent for 1850 acres. The judgment above mentioned was enjoined, and in 1830, Graham became a surety in an injunction bond, on which the judgment was afterwards obtained against his executors, the payment of which was the founda-

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tion of their judgment against S. Ratcliff. This injunction was pending until some years after the date of the deed now in question. And in 1840, after its dissolution, the party who claimed the benefit of the judgment in ejectment, turned the Ratcliff's out of the entire possession of the 100 acres of land by virtue of a writ of *haberi facias* issued on the judgment, which he seems to have considered as covering the whole, and indeed other land, of which he also took possession, without regard to its being within the 1300 acre patent or not. The parties thus turned out of possession, brought writs of forcible entry, &c., five in number, and also actions of trespass, in one of which Silas Ratcliff was sole plaintiff, and a restitution was awarded of all the land outside of the 1300 acre patent. In addition to which, there seems to have been a compromise of all the actions, by which Richard Ratcliff and several others were to pay the opposite party \$400, and thus, as we understand it, regained a possession more extensive than was awarded by the judgment of restitution, but did not obtain the adverse title. And it is proved that Richard Ratcliff paid \$50 on account of this compromise.

It will be seen from this statement that the greater part of this litigation occurred long after the conveyance from Silas to Richard Ratcliff, and the witnesses do not distinctly refer to the previous litigation as then reducing the value of the land or title to about \$300. There was, however, a judgment pending, which, as we understand, covered some portion, not precisely ascertained in this record, of the 100 acres in contest. This fact, and the uncertainty as to the extent of the judgment, or the idea that it covered the entire 100 acres, and that the judgment and the injunction suit involved the whole, may have operated to diminish the estimated value of S. Ratcliff's title or interest in the transaction with is son. And under the evidence referred to, and other evidence in the case, it was for the jury to determine whether, and how far it did so oper-

Where a conveyance is assailed on the ground of fraud, the Court in its instructions to the jury should hypothecate its instructions upon all—not a part of the facts adduced to show fraud or no fraud in the transaction.

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ate. And we are not prepared to say that the jury might not have found, that under all the circumstances, the consideration of \$300 was reasonably adequate for the interest of S. Ratcliff, and might have been so considered by the parties at the date of the deed, though they were also authorized to find that the \$300 was a grossly inadequate consideration. Under this view of the case, the Court could not properly direct the jury to find the deed fraudulent and void, upon their belief of certain facts tending to prove fraud—unless the gross inadequacy of the consideration was submitted as one of the facts to be believed from the evidence. And as this fact is omitted in the third and fourth instructions given for the plaintiff—each of which concludes that the deed is fraudulent, without reference to the fairness or gross inadequacy of the consideration, or including other facts which would be conclusive evidence of fraud, each of them is deemed erroneous. The second instruction for the plaintiff submits the inquiry as to the inadequacy of the consideration, using the word greatly instead of grossly inadequate. And although we might not reverse the judgment on this ground, we are of opinion that the consideration should have been grossly inadequate, in order to make the inadequacy of the consideration with the other facts enumerated in the second instruction, conclusive evidence of fraud in the deed.

When the consideration of a conveyance is fully adequate, the fraudulent intent of the grant or in making the conveyance will not affect its validity, unless the grantee participated in that intent.

We are also of opinion that if the consideration paid, was fairly adequate to the value of the interest sold and conveyed by the deed, as understood at the time, the fraudulent intent of the grantor, if it existed, would not affect the validity of the deed unless the grantee participated in that intent. And the Court should have so instructed the jury as substantially asked to do by the defendants. We are not satisfied that the evidence authorized the jury to find that S. Ratcliff was induced to enjoin the judgment in ejectment by a promise of John Graham to save him from costs. But if it did, the injunction bond and the judgment on it, was for rents, &c., as well as for the costs of the injunction suit. And

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the fact that costs, certainly not exceeding \$200, named in the declaration, were included in the judgment against Graham's executors for \$1300, even if that was not the ground of the credit on their judgment against S. Ratcliff, could not have any bearing on the question of fraud, or on the right of recovery in this case. And there was no error in refusing the instruction as asked for by the defendant on that subject.

The jury would not have been authorized by the evidence in this case to find that at the date of the deed in question, S. Ratcliff had property exclusive of the land conveyed, to have paid all his liabilities due and impending, and the instruction based upon that fact was properly overruled.

The other instructions asked for by the defendants, and refused by the Court, were either abstract or misleading, and erroneous in principle as applied to this case, and were properly overruled. The reasons for this conclusion as to most of these instructions, are shown in the former opinion, and in the opinion in the case of *Kendall vs Hughes*, (7. B. Monroe,) and need not be repeated. There was no evidence of R. Ratcliff being possessed under adverse title. As the judgment must be reversed and the cause remanded for the error of giving the third and fourth instructions for the plaintiff, we have not thought it necessary to consider the question as to the propriety of overruling the motion for a continuance. And we remark, that there would be less danger of error on either side, if the parties would be content that the Court should instruct the jury as to the definition or essence of fraud as against creditors, and its effect upon a conveyance, leaving the jury to weigh all the circumstances, unless there be some one or more, which make the deed *per se* fraudulent.

Wherefore the judgment is reversed, and the cause remanded for a new trial on principles consistent with this opinion.

Hazlerigg and Daniel for appellant; *Apperson* for appellee.

CHANCERY.

Sander's Executors vs Sanders.

Case 8.

ERROR TO THE PULASKI CIRCUIT.

Husband and Wife. Dower. Slaves.

June 16.

JUDGE MARSHALL delivered the opinion of the Court.

The case
stated.

THIS bill was filed by Paschal H. Sanders, to recover one-fifth of \$370 and interest, alledged to have been received in 1819, by G. W. Sanders, deceased, as guardian of the complainant and four other infant children of Becky Sanders. It appears that the five wards were the children of the said G. W. Sanders by his first wife Becky Sanders; that before their marriage the father of Becky Sanders had died, and certain slaves of his estate had been allotted to her mother as dower, that after the death of the dowress who survived her daughter Mrs. Sanders, G. W. Sanders having been previously appointed in Virginia, the guardian of his five children, purchased at the sale of the dower slaves a boy the offspring of one of them, and retained out of the price about \$350, on account of the reversionary interest of his deceased wife in the dower slaves. In 1845, G. W. Sanders, after having had another set of children by a second wife, departed this life and left a will which was duly admitted to record, whereby after a specific provision for his wife and younger children until their maturity, he directed an equal division of the proceeds of his entire estate except a few small legacies, among all of his children, taking into consideration the advancements made to them which he particularized in the will. This bill was filed in 1848 against his executors, by one of the children of the first marriage, to whom according to the statement of the will three hundred dollars had been advanced.

The answer filed by one of the executors, after stating the manner in which the money was received or

retained as above detailed, calls on the complainant to state if the money claimed by him in this suit was not derived from and the proceeds of slaves which had been allotted to the mother of the complainant's mother for her dower in the slaves of her husband, the father of complainant's mother, before her marriage; and denies that his testator at any time received and collected any money in his character as guardian for complainant, or as an individual, that complainant was entitled to, unless the money above mentioned was legally and properly going to complainant. This interrogatory was unanswered.

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The defendant also contends that if any thing was due by the testator to the complainant, he is precluded by the will from claiming it—and the will is relied on as a bar to the claim. We are of opinion however, that the will furnishes no evidence on this subject. The parol testimony to the effect that the testator intended to satisfy the claim of his first children, by the equal division directed in the Will is inadmissible for that purpose; and so much of the depositions excepted to as relate to that matter was properly rejected. But upon the pleadings and evidence, we are satisfied that the complainant and the other children by the first marriage had no pecuniary claim against their father unless one arose on the facts above stated. Nor do we find any evidence of the recognition of such claim by the father, except that shortly before making his will, he expressed a doubt whether, as he had received this money in right of his first wife after her death, it ought not to go to his first children, which doubt was afterwards resolved by the consideration that his second wife had been of as much advantage to his first children as the sum received by his first wife amounted to; and he made no provision for paying that sum to them. Nor, if it was due to them, can it be regarded as being satisfied or extinguished by the equal division directed among all his children, which he directed, not as a mode

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Slaves assigned to the widow for dower in the estate of the husband, vest in the distributees subject to the claim of dower, and up on the marriage of one of the female distributees vests in her husband, and though the feme distributee dies before the dower, the husband of such distributee is entitled to the interest which vested in his wife before the death: *Turner vs Davis*, (1 B. Mon., 152; 4 lb. 236; 5 lb. 556; 7 lb. 535; 9 lb. 96; 10 lb. 412; 3 Litt. 263-64.) decide that if the wife die during the continuance of the particular estate in slaves, the right vests absolutely in the husband as survivor.

of paying his first children, but because he thought he owed them nothing.

Assuming, as upon the record we must do, that the claim of the complainant is founded upon the receipt by his father in right of his mother, of her interest or portion in the slaves of her father, which had been allotted to her mother for dower before her own marriage, and that the doweress outlived her daughter, and died during the life of the daughter's husband, by whom his wife's portion in the dower estate was afterwards reduced into possession; we think it entirely clear that the children of the first marriage had no right or interest in it as heirs or distributees of their mother, but that it belonged absolutely to their father as surviving husband; and that even if he supposed himself to be under an obligation in law or conscience to pay or account for it to her children and as their guardian, this mistake as to the law imposed no liability, and conferred no right legal or equitable, but the question remained subject to his own determination, of which no one has a right to complain. The allotment of the slaves as dower, made of course with the assent of the executor or administrator, vested the title not only in the doweress for her life, but also in the heir or heirs for their reversionary interest. And this vested legal interest must be regarded as at least equivalent in all respects to a vested remainder. But it is well settled by repeated adjudications in this Court, that if a woman marries, having at the time a vested remainder in slaves expectant upon a life estate, which outlasts the coverture, this interest, if not reduced into possession nor otherwise disposed of during the coverture, survives to, and vests absolutely in the surviving husband or wife; *Turner vs Davis adm'r.*, (1 B. Mon., 152.) *Thomas, &c., vs Kennedy*, (4 B. Mon., 236.) *Greens' heirs vs Boone*, (5 B. Mon., 556.) *Ring, &c., vs Baldrige, &c.*, (7 B. Mon. 535.) *Davenport vs Prewett*, (9 B. Mon., 95.) *Banks vs Marbury*, (3 Litt. 263-4,) and *Morrow vs Whitesides ex'r.* (10 B. Mon., 412.)

According to the principle of these cases, the interest of the *feme* in a vested remainder in slaves held before marriage, does not vest absolutely in the husband by the marriage, but if the wife die first and during the continuance of the particular estate, it vests absolutely in the husband as survivor; and certainly when after the termination of the particular estate he reduces the interest to actual possession, it is absolutely his free from the claim of the representatives of the wife. Now if there is any difference between a vested remainder in slaves expectant upon the termination of a life estate, and the interest of an heir in slaves allotted to the ancestor's widow as dower, it is that the latter interest is the most absolute and immediate of the two, and therefore there is more ground for saying that it vests absolutely in the husband by the marriage. But waiving any discussion of this point, the analogy between the two cases is sufficient to place the right of the husband in the reversionary interest herein described, upon a footing at least as favorable to him as his right in the vested remainder. And this, which we are inclined to think is the true doctrine on the subject is sufficient for the present case, and is decisive against the claim of the complainant.

Wherefore the decree allowing the claim is reversed and the cause is remanded with directions to dismiss the bill.

Fox for plaintiffs.

CHANCERY.

Rice vs Downing, &c.

Case 9.

ERROR TO THE MADISON CIRCUIT.

Sureties. Rent. Liens. Equity Jurisdiction.

June 14.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

Case stated
and decision of
the Circuit Court

RICE exhibited a bill in chancery against Downing, in which he alleged, that as the surety of the latter, he executed jointly with him, a note to Wanescott, for the sum of sixty-six dollars, being for the rent of a house in the town of Richmond; which note was not then due, and the rent was unpaid. He further alleged that Downing had no property except a horse, a cow, and his household and kitchen furniture; all of which was on the property rented from Wanescott, and on which the latter, as landlord, had a lien for his rent, to which he, the complainant by substitution, had a right in equity. He charged, "that said Downing was about to, and would, unless restrained, remove said property out of the county of Madison, with the intent, and to the effect of defeating said lien, and of hindering and delaying fraudulently the collection of said debt." He made Downing and Wanescott defendants, and obtained an attachment against the former.

The Circuit Court, upon final hearing, discharged the attachment and dismissed the bill; and Rice prosecutes this writ of error to reverse that decree.

The main question is—Had a Court of Equity jurisdiction, upon the case made out in the bill?

The act of 1828: (2 Statute Law, 1441) authorizes a surety, where the debtor is about to remove his property out of the commonwealth to attach it—not where the

The proceeding was not authorized by the act of 1828: (2 Stat. Law, 1441.) That act authorizes the surety to sue out an attachment, when his principal is about to remove himself or his property from this Commonwealth, before he has discharged the debt, whether the same be due or not; but it does not authorize him to sue out an attachment, upon the ground that his

principal is about to remove the property merely out of the county where he resides.

Nor is the case embraced by the act of 1838: (3 *Stat. Law*, 116,) which applies alone to creditors, and furnishes them with a remedy when their debtor is about to make a fraudulent disposition of his property, with the intent of cheating, hindering, or delaying creditors in collecting their debts. A surety is not a creditor until he pays the debt, and is not therefore one of that class of persons designated by the provisions of the act.

The Virginia statute of 1748 (2 *Stat. Law*, 1351) is relied upon as applicable to this case. That statute authorizes a landlord where his tenant is about to remove his effects out of the county, before the expiration of the term, to sue out a common law attachment, to secure the payment of the rent when it becomes due.—The landlord could have proceeded under that statute in the present case, but it is at least questionable whether it would have authorized him to have instituted a suit in chancery and proceeded therein, by attachment, as the surety has done. Be this however as it may, it gives no remedy, either at common law or in equity to the surety.

It is contended however, that upon a lease of a house within the limits of a town, a landlord has a lien for his rent, whether due or not, on all the tenant's household furniture, and that a surety can, by substitution, enforce this lien in a Court of Chancery.

The principle is well settled, that a surety who pays a debt, is entitled to stand in the place of the creditor, as to all securities, liens and equities, which he may have to secure the payment of the debt: (1. *Story's Equity*, 478; 2 *John. Ch. Rep.* 560; 4 *John Ch. Rep.* 123.) But this right only accrues to the surety, upon the payment of the debt, until which time his only remedy, independent of statutory regulations upon the subject, is by bill in chancery when the debt becomes due, to insist on its payment, and to require the creditor to enforce his demand against the principal debtor.

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vs
DOWNING, &c.

removal is out of the county only. A surety is not a creditor within the meaning of the act of 1838: 3 *Statute Law*, 116) and therefore has no right to sue out an attachment in chancery on the ground that the debtor is about to make a fraudulent disposition of his property.

The act of 1748: (2 *Statute Law*, 1351) gives no remedy to THE SURETY for rent, either at law or in chancery, to attach the property of the tenant on the ground that the tenant is about to remove his property out of the county, though the landlord MAY have such remedy.

A surety who pays the debt of his principal has a right in equity to be substituted to all the securities, liens, and equities of the creditor for the debt: (1 *Story's Equity*, 478; 2 *John. Chy. Rep.* 560; 4 *lb.* 123;) but this right only accrues upon the payment of the debt. Tho' he may, when the debt becomes due, by bill in equity, compel the creditor to enforce his demand against the principal debtor.

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^{vs}
 WEBB'S HEIRS.

A complainant who has no right to relief upon the facts stated in his bill, has no right to claim a reversal on the ground that all the proper parties are not before the Court.

The surety in this case, not having paid the debt, was not entitled to an equitable substitution, either to the rights or the remedies of the creditor against the principal, and the case not being embraced by any statutory provision, the suit could not be maintained by him.

The plaintiff in error, not having been entitled to any relief upon the case presented by him, has no right to a reversal of the decree, if all the proper parties were not before the Court.

Wherefore the decree is affirmed.

Turner for plaintiff; *Burnam* for defendant.

CHANCERY.

Webb's heirs vs Webb's heirs, &c.

Case 3.

ERROR TO THE CLARK CIRCUIT.

Wills. Devises.

June. 16

JUDGE CRENSHAW delivered the opinion of the Court.

The clauses of the will presenting the question, a decision of the Circuit Judge.

WILLIAM WEBB, dec'd., by his last will and testament, among other devises, devised to his son William S. Webb, a moiety of the tract of land on which he resided, subject to the use and enjoyment of his wife during her life, or widowhood. Another tract of land, called his Bladesville tract, he devised to his son, Richard M. Webb. But, as his son, William S., could not enjoy the land devised to him, until the marriage or death of his wife, he, "therefore, (to use the language of the will,) reserved to his said son, William S., one half of the rent or profits of the Bladesville tract, devised to Richard, until his son, William S., could get possession of the land devised to him."

William S. Webb died intestate, under the age of twenty-one years, without wife or children. And this suit was brought for a settlement and distribution of his estate.

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vs
WEBB'S HEIRS.

An amended answer was filed by Richard M. Webb, submitting to the Court the question—whether the charge upon the Bladesville tract of land determined at the death of William S. Webb—whether the uncollected rents, which, at that time, had accrued, were collectable, and what proportion of them, if any, his mother was entitled to receive.

It appears to have been agreed between the parties that these questions should at once be decided by the Court upon said amended answer, as preliminary to a final determination of the suit.

The Circuit Court decided that the said interest of William S. Webb in the rents of the Bladesville tract, ceased at his death, and no interest therein survived to his heirs.

This opinion of the Circuit Court does not, **IN TERMS**, decide whether the rents which had accrued, and were not collected at the death of William S., could be collected or not; nor, whether his mother is entitled to any portion of them or not. Yet, in the assignment of errors, it is alleged that the Court erred in this respect, as well as in deciding that the interest of William ceased at his death. We, of course, cannot look beyond the question actually decided by the Court below. But, when we have examined and decided that question, no difficulty can, we presume, remain as to the other points.

In construing wills, the intention of the testator, if possible, is to be arrived at. What, then, was his intention in creating a charge upon the Bladesville tract of land in favor of his son William S? We think this question not difficult of solution, when we enquire into his reason for it, assigned by himself, in his will. He says: "As the tract of land I propose to give to my son, William S. Webb, I have lent to his mother during

In the construction of wills the intention of the testator is, if possible, to be ascertained.

"As the tract of land I propose to give to my son, Wm. S. Webb, I

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have lent to his mother during her widowhood, I therefore reserve to my son William one half of the rent or profits of the said tract hereby given to my son Richard, until my son William can get possession of the land I have lent his mother." W. S. Webb having died during the widowhood of his mother without issue: Held that his interest in the rent ceased at his death.

her widowhood, I, *therefore*, (for this reason,) reserve to my said son, William, one half of the rent or profits of this said tract hereby given to my son, Richard, *until* my son, William, can get possession of the land I have lent his mother." Upon the death or marriage of his mother—events which might happen at any time, that—moment, William is to be let into the enjoyment of his land, and the charge upon Richard's is to cease. No provision is made by the testator in view of these contingencies, which he knew might occur at any hour, for the continuance of this charge one moment beyond the death or marriage of his widow. The charge is placed upon the land of Richard, not because he had given Richard too much, but, because William could not get the immediate use of the land devised to him. It was for the latter reason only, as the testator explicitly declares. It may be true that the testator thought that the devise to Richard was better able to bear this charge than that to any of his other children, but we cannot believe that it would accord with his intention to continue a charge, onerous and inconvenient from its very nature, upon the land of Richard for the benefit of his other children, already well provided for, one moment after the death of William. This charge is imposed, "*until my son, William, can get possession of the land I have lent his Mother.*" It may continue until the marriage or death of the mother, it is true, but the reason in the mind of the testator for its continuance till such period having ceased by the death of William, the charge itself ought to cease. We believe this charge was designed to be *personal* to William, or, to William and his descendants, (for there would be the same reason for giving it to them as to him,) and, if so, he having died without issue, it ought to cease and determine at his death.

The decree of the Circuit Court upon this question, submitted by the amended answer of Richard, and the agreement of the parties, being in conformity to our own views, ought to be affirmed.

OATS
vs
JONES.

It appearing to have been the opinion of the counsel, that the question made in regard to the uncollected rents, and the right of the widow to share in their distribution, had been decided by the Court below, we do not deem it amiss to remark merely, that we regard the entire rents which had accrued at the death of William, whether collected or uncollected, as personal assets, subject to distribution, and that his mother, of course, is one of the distributees, but as to them the Court below has rendered no decree.

Wherefore the decree that the charge upon the land of Richard ceased at the death of William is affirmed.

Huston and Robertson for plaintiffs; *Hanson* for defendants.

Oatts vs Jones.

MOTION.

ERROR TO THE WAYNE CIRCUIT.

Case 11.

Motions. Sheriffs.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

June 17.

THIS was a motion against the plaintiff in error as sheriff, for having issued and collected a fee bill containing illegal charges. The sheriff's receipt for one dollar and fifty cents, for serving a subpoena in Chancery on three defendants, and also for eight dollars and eighty-two cents, for returning said subpoena not found, as to forty-two of the defendants, being twenty-one cents for each defendant, was produced and relied upon to sustain the motion, but there was no evidence that the sheriff had issued a fee bill for the charges contained in the receipt. The Circuit Court decided that the

Case stated

Ques
de
Jours

charge made for the return of not found, on the chancery subpoena, was illegal; allowed the sheriff twenty-one cents for the return, ordered him to restore the balance of the sum collected by him on that account to the plaintiff in the motion, and imposed a fine upon him of forty-one dollars. To that judgment, the sheriff has prosecuted a writ of error.

There is no statute of Kentucky allowing a Sheriff any fee for a return of "not found" upon a subpoena in chancery.

We have not been able to find any statute allowing a fee to a sheriff, for making a return of not found, upon a subpoena in chancery. For returning a *capias*, *non est inventus*, he is allowed a fee of twenty-one cents. The fee may have been allowed him, because to authorize such a return upon a *capias*, the law requires him to go to the place of residence of the defendant, and leave there a copy of the process. But the requisition does not extend to a subpoena in chancery, nor is the sheriff entitled to any fee for endorsing thereon a return of not found. The whole charge was therefore unauthorized and illegal.

The statute of 1828: (2 Statute Law, 702,) authorizes a fine against a Sheriff for issuing an illegal fee bill, or fee bill containing illegal charges to be inflicted upon motion, but does not embrace the case of collecting an illegal charge where no fee bill has issued.

But as there was no evidence that the sheriff had issued a fee bill for this illegal charge, the question arises, whether the case is embraced by the statute under which the motion was made. By the act of 1828, (2d vol. Stat. Law, 702,) it is enacted, "that all civil officers in this Commonwealth, who are by law authorized to issue fee bills, shall be subject to the same fines, forfeitures and liabilities, to which Clerks of Courts are now subject, for issuing fee bills containing illegal charges, and may be proceeded against in the same manner." According to this statute, the offence, for which a sheriff is subjected to the same fines, and made liable to be proceeded against in the same manner as Clerks of Courts, is for issuing a fee bill containing illegal charges. To charge and collect a fee not authorized by law, without having issued a fee bill therefor, is certainly illegal; but as certain officers are invested by law with the power to issue fee bills for services rendered by themselves, which when issued carry with them the right of distress, a right that affords a speedy and effi-

cient remedy for their collection, the Legislature has deemed it necessary to restrain an improper exercise of this power, and punish its abuse. The act however does not apply to a case where an illegal fee has been claimed and collected by a sheriff, without a fee bill having been issued; and being penal in its provisions, it cannot be extended by construction to a case not embraced by the fair import of the language used.

By an act passed in 1810, (1 *vol. Stat. Law*, 392,) a fine is imposed upon the Clerk of any Court who shall either charge or demand, or receive any greater or other fees than are allowed by law. The language of that act is more comprehensive than that used in the one under consideration, and the obvious discrimination by the Legislature between the cases provided for in the two acts, leads irresistibly to the conclusion, that it only intended the latter to apply, where a fee bill containing erroneous charges, had been actually issued.

Such is our interpretation of the meaning of the act, and consequently we think it does not authorize the proceeding in this case against the sheriff.

Wherefore the judgment is reversed, and the cause remanded with directions to dismiss the motion.

B. Monroe for plaintiff; *S. Williams* for defendants.

Sims
vs
Reed & Wife.

But by an act of 1810, a clerk is fineable for charging and collecting an illegal charge: (1 *Statute Law*, 392.)

Sims vs Reed & Wife.

ERROR TO THE MERCER CIRCUIT.

Exempted Property. Execution. New Trial.

JUDGE MARSHALL delivered the opinion of the Court.

WHEN this case was here upon the writ of error of Reed and wife, this Court gave a construction to that

TRESPASS.

Case 12.

June 17.

The ass
stated.

Sims
vs
REED & WIFE.

clause of the first section of the act of 1845: (*Session Acts, 1844-5, page 34-5*) which exempts from execution &c., (against *bona fide* housekeepers with a family) "all the spun yarn and manufactured cloth and carpeting manufactured by the family, necessary for the use of the family;" and, in effect, determined that the clause exempted manufactured cloth necessary for the use of the family, whether manufactured by the family or not. The former judgment was reversed, because the verdict was founded on an instruction which assumed that in this case, in which the cloth taken by Sims under the execution, was made of cotton bought from a store, and was woven for Reed the debtor, not in his family, but by a weaver in the neighborhood, at her own house, it was subject to levy and sale, and therefore excluded from the jury the question whether it was necessary for the use of the family: *MS. opinion, June Term, 1849.*

A decision of the Court of Appeals — settling the law arising in the case, and directing a new trial, is binding upon the Circuit Court in a subsequent trial thereof in the Circuit Court.

On the last trial, an instruction was given conformable to the opinion of this Court, and that instruction is now alleged to be erroneous, and sufficient ground for reversing the judgment. By this assignment of error, and by the argument relating to it, this Court is asked to reverse its own decision, rendered in the same case. It might be sufficient to say that the former opinion and mandate, being framed for the very purpose of prescribing the rule for a re-trial of the case, was not only binding upon the Circuit Court, but is binding upon the parties, and must be taken in this Court, as well as in the Circuit Court, to be the law of this case. But we go further, and say, that while it is obvious that the clause in question is susceptible of the construction given to it in this case, it is also manifest that that construction is in conformity with, and indeed required by the spirit and object of this and other statutes exempting property from execution. The general object of these statutes, and of that immediately in question was, not to encourage or even protect the manufacture of articles in or by the family of the debtor, though this may have

been incidentally in view, but to prevent his family from being deprived of such articles enumerated in the statute, as might be necessary for their use. The object was to preserve to them the means of living and of comfort, according to their circumstances. Carpeting is not an absolute or indispensable necessary; but where it is actually used, it is, in the ordinary sense, necessary to comfort, and if manufactured by the family, and thus necessary for its use, it is protected. But, manufactured cloth is, in this country, absolutely necessary, not only to the comfort, but for the decent and indeed the actual subsistence of every family. The statute did not intend to discriminate in its protection of this necessary article, between such families as had a spinning wheel and loom, and could use them for the manufacture of their necessary clothing, and others who, being unskilled in their use, or too poor to buy them, should, by their labor in other modes, purchase the yarn and pay for its manufacture into cloth necessary for their use. The material point, in view of the statute, is that the cloth shall be for the use of the family, and that it shall be necessary for that use. And we construe the statute so that, without violating its letter, its essential object may be effectuated.

If under the foregoing construction of the statute the levy was illegal, still if while the officer who made it, had the possession under the levy, or if while it was held by his bailee for him, Reed or his wife for him, attempted forcibly to take it from either, the officer or his bailee might lawfully resist such attempt, using such force only, as was necessary to retain the possession. But if the levy was illegal, Reed or his wife for him, had a right to take the cloth peaceably or by consent of the bailee having the actual possession, and the officer had no right to use force in regaining the possession thus peaceably acquired. Indeed, if the levy was illegal, it gave him no right to retake the property even peaceably from the possession of the owner. And certainly, if while it was in the manual and peaceable pos-

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vs
Reed & Wife.

The protection from execution of cloth manufactured in a family, given by statute in Kentucky extends to carpeting, though the thread may have been purchased and the weaving done by and in a different family.

If property, exempt from execution be taken by an officer, the defendant cannot use force to regain the possession, though he may regain it peaceably—but if the defendant does peaceably regain the possession, the officer cannot justify the use of force to retake it.

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vs
REED & WIFE.

session of Mrs. Reed, the officer took it from her forcibly, he thereby rendered himself liable not only for the trespass in thus taking it, but also for the personal injury to Mrs. Reed, involved in this unlawful act.

It seems that when the execution was levied, the cloth was in the loom, not quite finished; that the officer left it with the weaver to keep for him, he paying her at the time for the weaving; that when he returned on the next day, Mrs. Reed was in the loom house, the cloth had been cut from the loom by the weaver, and the end of it delivered by her to Mrs. Reed, who wrapped it several times around her arm, the other end being still on the beam. In this state of things, the officer coming in, took hold of the cloth between Mrs. Reed's arm and the beam, and in pulling one end from her, and disengaging the other from the beam, committed the injuries to her person for which this action of assault and battery is brought.

Assuming the levy to have been unlawful, the right to maintain the action depends essentially upon the state of the possession when the struggle for it commenced. If upon the evidence, there was any doubt upon this point, then the question as to the state of the possession, should have been submitted to the jury, and the instruction given for the plaintiffs; placing their right of recovery exclusively upon the illegality of the levy, would be deemed erroneous, in excluding this enquiry as to the possession. But upon the facts just above stated, there can in our opinion be no room for doubt as to the state of the possession. If the facts be true, the possession was in Reed, the owner of the cloth which was in the hands of his wife, and the officer forcibly and illegally took it from her. And as these facts are stated by the only witness to the transaction, without contradiction or impeachment or cause for suspicion as to their credibility, we should not on the mere possibility that the jury might have disbelieved the witness, pronounce the instruction fatally erroneous in not submitting these facts to the jury. A verdict against

Where the finding of the jury is in accordance with the weight of the evidence, and a contrary finding would have been contrary to the evidence, no reversal should take place because the Court gave an instruction not directly upon the point upon which the case should turn.

the facts thus proved would have been a verdict against the evidence as it now appears in the record. The submission of these facts to the jury as essential to the plaintiff's recovery, would have been a mere formality, and the assumption of them by the Court, cannot therefore be regarded as a substantial error prejudicial to the defendant.

The instructions asked for by the defendant, were inconsistent with the principles of this opinion; and there was no error in refusing them.

Wherefore the judgment is affirmed.

Taylor and Ballinger for plaintiff; *Harlan* for defendants.

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ERROR TO THE MADISON CIRCUIT.

Contracts. Idiots and Lunatics. Fraud.

CHANCERY.

Case 13.

JUDGE GREENHAW delivered the opinion of the Court.

June 17.

THIS suit was brought in the Madison Circuit Court, in the name of William Wilson by his next friend, for the purpose of setting aside a conveyance, made by the complainant, William Wilson, to Oldham, on the 27th day of June, 1848.

The case stated.

The bill alleges, in substance, that the complainant, owing to the infirmities of old age, diseases, and dissipated habits, had been, for years, unable to protect himself against imposition and undue influence in the management of his estate; that on the 27th day of June, 1848, the defendant, well knowing his condition, by fraud and importunity, induced him to convey to him, defendant, with general warranty, a tract of eighty five

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acres of land; that the consideration, expressed in the deed, of \$280, had not been paid, nor any part of it; that the tract of land, at the date of the deed, was worth at least the sum of \$1000, and perhaps more—that he is still in possession of the land.

The defendant answered, admitting that complainant is an old man, that the conveyance had been made for the consideration of \$280, but he states that the allegation, that he had paid no part of the consideration, is untrue; that he had paid the sum of \$80 at the date of the deed, and gave complainant two notes of \$100 each, for the balance of the purchase money, and that he intends to pay them. He denies the other material allegation of the bill, and says that he is the owner of the land, and intends to coerce possession.

At the succeeding term of said Court, the defendant filed an amended answer, in which it is alleged that, instead of purchasing the land at the time the deed bears date, he made the purchase several years before, to-wit, in 1841, or about that time, when property was very low; that the deed was made fairly, and without importunity, in compliance with this previous purchase, which was by parol contract; that, at the time of the purchase, and also when the conveyance was made, it was understood between him and complainant that complainant was to have the right to build a house on any corner of the land he might think proper to select, and have five or six acres of ground *for a truck patch*, and he and his daughter, Delphia, live there during his life. At the close of this answer, he again insists that the price agreed to be paid for the land was a full, and fair one, *at the time the contract was made*.

Before the answers were filed, the defendant demurred to the bill, the Court overruled the demurrer, and the defendant still insisted in his answer that the bill was insufficient.

The judgment of
the Circuit
Court.

The Circuit Court, after requiring \$59 25 cents, being as we suppose, in his opinion, the only sum including interest which had been paid of the purchase mo-

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ney, to be brought into Court for the defendant; decreed, that the deed of conveyance and the two notes given for the purchase money, and also a receipt executed to the complainant by the defendant for a debt on Stephen James, to be cancelled and set aside.

It is now insisted that the Court below erred in not sustaining the demurrer to the bill; in granting relief to the complainant; and, particularly, in not requiring the complainant to pay to the defendant the sum of \$80 with interest instead of the said sum of \$59 25.

It is contended by the counsel of the defendant, that a lunatic cannot sue by his next friend; that the suit must be brought in his own name, and not in the name of his committee. We think it a sufficient response to this objection to say, that this question cannot arise in this case. William Wilson does not appear to be a lunatic, nor does he sue as such. The bill alleges that he is an old man of great mental weakness, "unable to protect himself against imposition and undue influence," but not that he is a lunatic. And, in Mitford's pleadings, side page, 30, it is laid down, that, "persons incapable of acting for themselves, though not idiots or lunatics, or infants, have been permitted to sue by their next friend. But it will not be denied that the complainant, though a man of weak intellect, can sue in his own name without a next friend, and were there no authority upon the subject, we could not suppose that the mere addition to his own name of the phrase, "*by his next friend Robert Wilson,*" would vitiate his suit.

Our attention has been called to the doctrine of the law, as laid down by Lord Wynford, and quoted by Story, that, in order to impeach a conveyance on the ground of imbecility only, the imbecility must be such, as would justify a jury under a commission of lunacy in putting the vendor's property and person under the protection of the chancellor. We regard this to be the true doctrine of the law. But the application to the chancellor in this case, to set aside the conveyance, is not made upon the ground of imbecility merely, but upon

Persons incapable of acting for themselves, tho' not idiots or lunatics may sue by next friend. Mitford's Pleading, 30, and the addition of the words "by next friend to his own name," would not vitiate the proceeding.

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the imbecility of the vendor, and the fraud and impotency of the vendee. And, Lord Wynford, after laying down the doctrine as quoted by Story, immediately adds: "But a degree of weakness of intellect, far below that which would justify such a proceeding, coupled with other circumstances, to show that the weakness, such as it was, had been taken advantage of, will be sufficient to set aside any important deed."

Story then remarks: "The doctrine, therefore, may be laid down as generally true, that the acts and contracts of persons who are of weak understanding, and who are thereby liable to imposition, will be held void in Courts of equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but has been imposed upon, circumvented, or overcome by cunning, or undue influence."

Independently of the proof in the cause, it appears to us that the transaction itself, as developed by the amended answer, is not free from evidences of unfairness. In the first place a parol contract for the sale and purchase of the land, is made in 1841; not a cent of the purchase money is then paid; and no change of the possession takes place; the vendor remains upon the land for six years, and then and not before, a deed is made which the defendant acknowledges does not recite the whole contract; the only important and beneficial part of it to the complainant, being left out—that of having reserved to him the poor privilege of selecting a *truck patch* of five or six acres in some corner of the land. It is strange, to say the least of it, that the vendor should desire to sell his land, and the vendee to purchase it in the year 1841, and that the contract should then be made, and yet that it should not be consummated till June, 1848.

When, however, the testimony is examined, and considered, in connection with the developments of the amended answer, we think there is little or no room left for doubt. Although several of the witnesses say, that

The acts and contracts of persons of weak intellect, & thereby liable to im-

in their opinion, the mind of the complainant is as good as other ordinary minds of his age, yet the proof is, that he is quite an old man, feeble, not only in body but in mind, that he has rarely gone from home for many years; and Baxter, the man who was called upon by the defendant to write the deed, and who lives in three miles of the complainant, says that he never saw him as far from home as his house, except upon the day the deed was prepared, but once, and that was about twenty years ago; that he is easy to be operated on by importunity; that age and other causes have enfeebled his mind; that the complainant had, within the last five or six years, offered to sell him the land more than once, but he declined purchasing, believing that he could get it for less than half its value.

It is in proof by another witness, that he has lived in the neighborhood of the complainant for ten years, and never knew him to be off his place but once, and that was the time when the deed was made at Baxters.

It is unnecessary to make further reference to any particular witnesses in regard to the infirmities of the old man. It is sufficient to say, that the proof establishes to the satisfaction of our minds that he is a man of very weak intellect, and susceptible of being easily overreached.

Immediately upon executing the deed, he turned to the defendant and enquired for his money; the defendant replied, that he did not have the money, and that it would be better for complainant not to have it.

He seemed not to be conscious how the consideration was to be paid. Whilst he was thinking that he was to get the money, the sum of eighty dollars was arranged without the payment of a single dollar, and notes were given for the remainder of the consideration; and these notes not taken away by him, but left with Baxter. He was mere clay in the hands of the potter, Oldham, to be shaped and fashioned according to his own taste. The old man is said to have had great confidence in Oldham, and Oldham is said to be a shrewd man.

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position, will be held void by the Chancellor, if the act or contract of the party justify the conclusion that the party has been imposed upon, circumvented, or overcome by cunning or undue influence.

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Although, at the time of the alleged parol contract, land and every thing else were depressed in value, yet in June, 1848, when the conveyance was executed, this land which was sold for \$280, is proven to have been worth twice this sum. Indeed some of the witnesses estimate it as high as \$10 or \$12 per acre.

A contract for the purchase of a tract of land, worth twice the contract price, made with an old ignorant man, with a purchaser of shrewdness, and having great influence with the vendor: held to be illegal and unobligatory and the conveyance set aside.

To sustain a contract made under such circumstances, would be to encourage the arts and wiles of the wicked, the shrewd, and the cunning, to the ruin of the weak and the innocent. Mere weakness of intellect is not alone sufficient to set aside a contract made without the practice of fraud or unfairness; but, when made, as we are constrained to believe this was, by the exercise of an undue and improper influence upon a confiding, ignorant, and exceedingly weak-minded old man, it ought not, in our opinion to receive the sanction of a Court of justice.

In regard to the sum of \$30, a claim on Stephen James, which it is alleged the complainant had agreed to pay, and which was received by him in part pay for the land, we need only remark that it does not appear that the complainant was ever legally bound to pay this claim. Moreover, it is proved by James that the true amount of this claim was twenty instead of thirty dollars, and that he still owes it to Oldham. The receipt for it executed by Oldham to the complainant when the deed was made is set aside by the decree, and he has been restored to his claim on James, and we perceive no error in this.

Wherefore the decree of the Court below is affirmed.

Turner for plaintiff; *Carpenter and Burnam* for defendant.

Brannin vs Henderson.

PET. & SUM.

ERROR TO THE JEFFERSON CIRCUIT.

Case 14.

Acceptances. Orders.

JUDGE HISE delivered the opinion of the Court.

June 18.

Case stated.

BRANNIN, the plaintiff, brought his petition in the Jefferson Circuit Court against Isham Henderson, as acceptor, upon his acceptance, written upon the back of the following instrument:

“PROVIDENCE, February 20th, 1849.

Mr. ISHAM HENDERSON:

Will please pay to Woodville and Pollard, one hundred and fifty dollars and ninety-one cents, and charge the same to my account.

B. N. HORNSBY.”

Upon the back of which is written the following sentence, signed by Isham Henderson, to-wit:

“I will see the within paid eventually.

ISHAM HENDERSON.

April 9th 1849.

Woodville & Pollard, the payees, transferred this paper to the plaintiff, in writing, on the 13th of October, 1849. There was a demurrer to this petition, joinder and judgment in the Circuit Court thereupon in favor of the defendant, sustaining the demurrer and giving costs against the plaintiff, who has appealed to this Court.

The only question to be noticed in this case is, whether Henderson is liable, and whether an action can be maintained against him as acceptor, upon such acceptance as that written on the back of the order and signed by him, to-wit: “I will see the within paid eventually.”

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A written acceptance on the back of an order made by the drawee in these terms: "I will see the within paid eventually" is a binding acceptance to pay forthwith, and an action lies for failing to pay.

The defendant here certainly must be regarded as undertaking to pay the amount of the orders at some time, and no precise time or certain event, or precise condition, having been fixed or stated in the acceptance upon which he would pay, (or *see paid*, which imports the same,) the money as requested in the orders; then according to the reasonable rule so well settled, that a promise or obligation to pay money, no time fixed, it is due and payable at the date of the undertaking; so also, if one undertakes to pay money when convenient, or as soon as practicable, or as soon as he can, or "eventually," and upon other vague and undefined conditions, or at an indefinite period, he is bound to pay within a reasonable time at least, after promise, if not forthwith, and without regard to the happening of any contingency or event whatever, where none is specified in the contract. Were not such the rule, then there would be a class of undertakings and contracts based upon good and valid considerations like the one in question, and others of a similar character, that could never be enforced. A reasonable time was given to defendant—the acceptance is dated April 9th, 1849, and the petition was not filed until 6th of February, 1850.

The defendant is bound and liable as acceptor, and the sentence signed by defendant as above quoted, is a good and valid acceptance, although the defendant, thought proper in writing it, to use the words "I will see paid," instead of "I will pay." The opinion is entertained that the only certain and sure way by which Henderson, the acceptor, can ever expect to see the amount of the order paid, is to pay it himself, and thus like some other prophets in the world, produce by his own action, the verification of his own prediction.

Wherefore the judgment of the Circuit Court is reversed, and the cause remanded with directions that the defendant's demurrer to plaintiff's petition be overruled and that defendant have leave to withdraw his demurrer, and plead to the merits of the demand, in default of which, that judgment be rendered against the de-

Yendant for the amount of the order, with interest from the date of the acceptance, until paid, and costs of suit.

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Speed and Worthington for plaintiff; *Loughborough and Ballard* for defendant.

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CHANCERY.

ERROR TO THE LOUISVILLE CHANCERY COURT.

Case 14.

Common Carriers.

CHIEF JUSTICE SIMMONS delivered the opinion of the Court.

JUNE 19.

THE only question in this case, is, can the owners of a steamboat, by inserting in the bill of lading, that the boat is not to be accountable for breakage of the contents of boxes received by them as freight; so limit and restrict their undertaking as common carriers; that they will be discharged from all liability, although an injury to the contents of the boxes, may have been produced by gross negligence upon their part.

A common carrier can relieve himself by a special contract, from his liability as an insurer, and may on receiving goods as freight, insist on special and qualified terms, by which his responsibility is to be limited. Still however the doctrine is well settled, that common carriers cannot by any special agreement exempt themselves from all responsibility so as to evade the salutary policy of the law. They cannot exempt themselves from liability for losses or injuries occasioned by the gross negligence of themselves or their servants; *Story on bailments*, 365.

Common carriers cannot exempt themselves from liability for gross negligence of themselves and agents or serv'ts by writing in the bill of lading that the boat is not to be accountable for breakage of the contents of boxes received: (*Story on Bailments*, 365).

The boxes received in this case by the boat, contained looking glass plates of considerable value. Their

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contents were made known to the officers of the boat; and they were so marked as to indicate that it was necessary to their safety that great care in handling them should be observed. The testimony proves most satisfactorily that they were delivered to the boat at New Orleans in good order, the contents uninjured, and the glass packed with great care. It further appears that when they were delivered at Louisville, all the glass in one of the boxes was broken into small fragments. The testimony leaves no room for rational doubt that the box received during the time it was in the possession of the boat, a violent concussion, which occasioned the total loss of its contents. An indentation upon the outside of the box; the fact that the plates of glass were of considerable thickness, and not easily broken, and the additional fact that boxes containing glass were turned over and over by the hands on the boat, as if they were boxes of dry goods, all tend to produce that conclusion. Besides, the officers of the boat have failed to prove that the loss was the result of an unavoidable casualty, or to manifest the manner in which it actually occurred. It seems to us therefore, that it must have been the consequence of gross negligence.

Although the responsibility of the owners of the boat as common carriers was restricted and modified, by the terms of the bill of lading, yet the provision that they were not to be accountable for breakage, does not have the legal effect of exempting them from such injuries as arose from gross negligence, and therefore the decree of the chancellor, which requires them to compensate the owner of the glass for the loss he sustained, is consistent with the principles governing the law of the case.

Wherefore the decree is affirmed.

Guthrie for plaintiff; *Speed* for defendant.

Northcut, &c. vs Whipp and Wife.

APPEAL FROM THE CASEY CIRCUIT.

Estates in fee. Dower. Curtesy.

JUDGE MARSHALL delivered the opinion of the Court.

THIS bill was filed by Whipp and wife, the latter having been the widow of William L. Northcut, to obtain dower and distribution, in certain land and slaves, &c., formerly the property of Archer Northcut, the father of said William L., and which had been devised by the will of Archer Northcut in the following manner:

The testator first gave to his wife, Sally Northcut, the brick dwelling house, certain slaves by name, also one equal half of his land and such other property and estate (except slaves,) as he might die possessed of, to have and to hold during her natural life, and at her death to go to and descend to his son William L. Northcut, to whom he devised the Salt well on his land; and the residue of his lands, negroes, and other property, he might die possessed of, together with the portion in manner and form as above bequeathed to his wife, to have and to hold to him and his heirs forever. And he desired that his wife should continue his son with her, and that he should act towards her as a son, &c., &c.

By an explanatory codicil made shortly after the date of the will, it was stated explicitly that the testator's wife was to have the slaves devised to her, together with such other parts of his land, goods, and chattels, and credits, as shall be an equal half of his estate, to hold and use during her natural life, and then to his son William and his lawful heirs forever. And to remove doubts as to the disposition to be made of his estate at the death of his wife; and in case of his son William's dying without lawful heirs, the testator declares that

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The object of the bill.

The provisions of the will of A. Northcut, under which complainants claim.

The codicil to the will.

12m 65	90 120
12bm 65	f133 410
12bm 65	d137 80

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his will is, that should his son William die before his (testator's) wife, and leaving no lawful heirs, the bequest to him shall be held and enjoyed by his (testator's) wife during her natural life, and at the death of his wife, she having out-lived his son William, or at the death of his son William, and leaving no lawful heirs, he declares that his will is, that his entire estate, real, personal, and mixed, shall descend and pass to his (testator's) four sisters, or their heirs, and to the five brothers or their heirs, of his wife, to be equally divided between the heads of the said families.

It appears that after the death of the testator, William, his son, died in the lifetime of Sally Northcutt, the testator's widow, leaving no children, but leaving a widow who afterwards intermarried with Whipp, and Sally Northcutt being dead, they have filed this bill against the ulterior devisees who claim that William L. Northcutt, having died without issue and before the death of Sally Northcutt, she became entitled to the whole estate during her life, free from his wife's claim of dower, and that upon the death of said Sally, they became entitled in like manner to the whole estate in fee.

The decree of the
 Circuit Court.

The decree gives to the complainant's during the life of Mrs. Whipp, one-half of the slaves, and one-third of the lands devised by Archer Northcutt to William L. Northcutt, and one-half of the personalty absolutely, with one-third of the rents of the land and one-half of the hire of the slaves, and provides for a division and assessment accordingly. It is doubtful on the face of the decree, whether that part of the estate originally devised to the testator's wife for life, is to be embraced in ascertaining the portion to be allotted to the complainants, or whether the allotment and division is to be made only in one-half of the testator's estate, being that part originally devised to his son.

A widow is not
 entitled to dower
 in a life estate
 which is not de-

As the interest of William L. Northcutt in that portion of the estate which was devised to Sally Northcutt for life, was a remainder after a life estate, which continued until after his death, he never was seized of

that portion so as to entitle his wife to dower in the land, as was decided in the case of *Arnold's heirs, &c., vs Arnold's administrator, &c.*, (8 B. Monroe, 202.) And it is well settled upon principle and authority that by the common law, the right of dower does not attach upon a remainder in fee in the husband, expectant upon a freehold estate in another not terminated at the death of the husband, because he has no seizin. This principle of the common law has not been altered by any statute in this state, but still prevails. We are not aware however, of the same principle having been applied to the case of slaves and personalty, in which the husband may be entitled to a future interest to take effect in possession, after a life estate or interest in another which has not terminated at his death. It is not necessary that a man should have had actual possession of a chattel to make it a part of his personal estate coming within the meaning of the terms "goods and chattels," and in the 28th section of the act of 1797, (*Stat. Law, 660.*) which regulates the distribution of intestate's estates. The intestate's right to the chattel, though dependent as to enjoyment upon the termination of an unexpired interest for the life of another, vests in his administrator, and is subject to distribution when the time of enjoyment arrives, if not before. And if the intestate's widow be alive at that time, we suppose she is entitled to her distributive portion with the other distributees, as if the chattel had been in possession at the death of her husband.

If therefore, there be no other objection to this part of the claim, but that which arises from the fact that W. L. Northcutt, the first husband, had only a future interest or remainder in the slaves and personalty devised to Sally Northcutt for life, and that he died before the termination of the life estate, we should be of opinion that at the death of the devisee for life, the widow of the devisee in remainder is entitled to a distributive share of the slaves and personalty then coming into possession. And as in this case, the intestate husband left no

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terminated during the coverture, & of which the husband was never seized during the coverture: (8 B. Monroe, 202.)— This principle does not however apply to a remainder in slaves thus situated, & the administrator of the tenant in remainder is entitled to the estate in slaves, & the widow to distribution.

Where there be no children of the marriage the widow is entitled to half the slaves of the husband, and half the personal estate after debts paid:— (*Tibbs vs Tibbs' Executor, 7 B. Monroe, 112.*)

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children, his widow, according to the opinion of the Court in *Tibbs vs Tibbs' executor*, (7 B. Monroe, 112,) would be entitled to one-half of the slaves for life, and one-half of the personalty absolutely, as decreed.

But it is insisted that under the will and codicil of Archer Northcutt, the interest of his son William in the entire estate devised by the will, was terminated by the event of his death without children, during the life of the testator's wife; and that the right of W. L. Northcutt's widow in that estate, being derived from and dependent upon that of her husband, ceased also at his death. The correctness of this conclusion depends upon the question whether under the will and codicil, an estate tail was devised to W. L. Northcutt, or a fee simple defeasible on his death without leaving children. If an estate tail was devised, then that estate being converted into a fee simple absolute by the statute of 1796 docking entails, his widow is certainly entitled to dower and distribution as she would have been in England, had the estate remained an estate tail. But if the will should be construed as giving him a fee simple defeasible on contingency, then as that contingency has happened by his death without children, the important question arises, whether the derivative interest of his widow was not wholly defeated as to land, slaves, and personalty, by the same event.

Upon the construction of the will, we think there is little difficulty, and especially in reference to the event which has actually happened, of the death of W. L. Northcutt without children, during the life of the testator's widow.

As the ultimate devisees are persons who would be heirs of William, on his death without leaving descendants, there is no doubt that the words 'lawful heirs,' used in describing the contingency on which the ulterior devises are to take effect, should be understood in the sense of heirs of his body, or lawful issue, or descendants, or children. And the codicil may be read as if the words 'heirs of his body,' or 'lawful issue

were inserted instead of lawful heirs. But whatever, upon the authority of the adjudications in England and in many of the United States, might be said of the effect of the words 'dying without issue, or heirs of his body,' used without other restrictive words to describe the contingency on which a further devise or disposition of the estate is made, and although some of these cases decide that even the word 'leaving,' in the phrase 'if he die, (or on his death) *leaving* no issue or heirs of his body,' would not be sufficient to restrict the failure of issue on which the devise over was intended to depend, to the time of the death of the person spoken of as dying without leaving issue, it is clear, even upon the British authorities, that if the words, 'dying without issue,' or others deemed equivalent, are accompanied by other restrictive words or circumstances in the will, plainly indicating that the death of the persons leaving no issue at that time, is the contingency referred to, such reference to a failure of issue, or heirs of the body, will not convert into an estate tail, an estate devised by previous words proper to create a fee.

Here, then, is a devise to William and his heirs forever, which gives a fee simple, and there are plainly two contingencies described on which ulterior devises are made, and to different persons. The first is, if William should die before testator's wife, and leaving no lawful heirs, (say, of his body,) and in that case, which actually happened, the bequest to him, that is, the estate devised to him, is to be enjoyed by testator's wife for life. Here are not only express words, limiting the contingency of W.'s death without issue to the life of the testator's wife, but the same instruction is implied in the devise over on the contingency stated, to the wife for life. Each of these circumstances has been held sufficient in numerous cases, beginning with that of *Pells vs Brown* in England, and coming down to that of *Deboe vs Lowen*, in this State: (8 B. Monroe.) to be sufficient to repel the implication of an estate tail, and to sustain the devise over as an executory de-

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A devise of slaves to one and his heirs forever, but if he die without lawful heirs before the wife of the testator, then to the latter for life &c Held that the testator took a defeasible fee & not a fee tail: (8 B. Monroe.)

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vise, making the first estate to which the contingency is annexed, a fee simple, subject to be defeated by the happening of the contingency.

This contingency of the death of William, without heirs of his body in the lifetime of his mother, having actually happened, the devise for life to the testator's wife, of that portion of his estate which had been at first given to William by immediate devise, was valid, and took effect in possession, and the entire estate vested by the will in the testator's wife during her life. The will then proceeds with the case first provided for, and which has actually happened, of the wife being invested with the entire property for life, and says: "And at the death of my wife, she having outlived my son William, or at the death of my son William, and leaving no lawful heirs, (of his body) the entire estate shall descend and pass to the persons described as ultimate devisees." That is, at the death of his wife, she outliving his son, who is supposed to have died without issue, the estate is to go to the ultimate devisees. Or, at his son's death, and leaving no heirs—that is, at his son's death, *after that of his wife*, the estate is to go to the same persons. The alternative case provided for after the word '*or*' must be that of the wife not outliving the son, because the case of her outliving him is provided for, by giving her the estate for her life, in that event, and it is obvious that the ultimate devisees were not to have the estate at the death of the son without issue, in the lifetime of the wife, but only in the case of his death without issue, at or after the death of the wife, and when she could not take the interest devised to her.

Then the will gives the entire estate to the ultimate devisees on either of two contingencies. If the son dies without leaving issue before the death of testator's widow, then she has a vested interest in the whole estate for her life, with remainder to the ultimate devisees. If the son survives the wife, the whole estate vests in him in possession, and in fee, subject to the devise over on his death without leaving issue. If the

son had survived the wife, and then died without descendants, the question would have arisen whether the words, "and leaving no heirs," used in reference to this contingency, mean, as in the previous clause, descendants living at his death, or whether the phrase "at the death of my son W. and leaving no heirs," should be understood as referring to an indefinite failure of issue, and as indicating an estate tail. But, although we might be inclined to adopt the former interpretation, we think the question does not arise in this case, and therefore do not decide it; because there is a clear devise to the testator's wife for life on the death of his son without issue in her lifetime, with a devise over to the defendants on her death. And each of these devises being certainly valid, the ultimate devisees are entitled, under these devises, in the contingencies which have happened, and it is immaterial whether they would or would not have been entitled, if the other case, on which the same estate is devised to them had occurred, instead of that which actually did occur.

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Then the question is—Whether, as the estate of W. L. Northcutt was defeasible on a contingency which has actually occurred, and as upon that contingency the will passes that estate over to the wife of the testator for life, and then to others who claim, they must take it subject to the claim of dower and distribution, on the part of the son's widow. With respect to distribution, that is, to the personal estate and slaves, we think there is not much difficulty in this question, because no right in these subjects attached to the wife during the coverture, and her rights depend solely upon the condition of her husband's title and interest at or after his death, and she had no right to them because they were devised over to others. But, with respect to the land devised immediately to the husband in fee, the question is not free from difficulty.

Upon this question the first idea that presents itself is that dower being an estate growing out of that of the husband or incident to it, cannot from its nature exist

Where an estate in fee is made determinable upon some particular event,

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and that event happen during the coverture no right of dower or curtesy exists: (Cruise Dig., Tit. Dower, Chap. 3, sec. 7) but when land is given to a man or a woman & the heirs of his or her body, the surviving wife is entitled to dower, and the husband to curtesy if issue has been born alive: (8 Coke Rep., 34.)

after the estate to which it is attached has ceased. In accordance with this idea it is certain that if the fee be evicted by title paramount, or be determined by entry of the donor for condition broken, dower and curtesy necessarily cease. So in case of a qualified or base fee, dower and curtesy cease when the estate is determined. And it is said by (*Cruise Digest Tit. Dower Ch., 111 sec. 27*) that where an estate in fee is made determinable on some particular event, if that event happens dower and curtesy cease with the estate. On the other hand it is well settled in the English common law, that in the case of an estate tail dower and curtesy continue after the estate is determined, as, where land is given to a man or a woman and the heirs of his or her body, and the donee marries and dies leaving no heirs of the body, the surviving wife is entitled to dower or the husband if there had been issue born alive to curtesy, though the estate of tail is determined ~~awarding~~ ^{at law} to its own limitation, and the interest of the donor or remainder man becomes immediate. In Paine's case: (8 *Coke Rep.* 34,) where this question as to curtesy was decided in favor of the surviving husband against the remainder man, the argument that the derivative estate must cease with the primitive, was answered by the Court by saying in effect that the right to curtesy was tacitly implied in the gift, and that it was not derived merely out of the estate of the wife, but was given to the husband by the privilege and benefit of the law, for as soon as he had issue his title became initiate, and could not afterwards be defeated by death of the issue, which being the act of God, ought not to turn to his prejudice. This reasoning applies substantially to the wife, whose title to dower is also initiate during the coverture, not in consequence of the birth of issue, which is not necessary, but by the mere fact of marriage and of the husband's being seized of an estate of inheritance which any issue of the marriages might inherit. Accordingly it is held as already stated that the surviving wife of a donee in tail is entitled to dower, although by

the death of her husband without issue the estate tail is determined. The estate tail must however, have been of such a character as that any issue which she might have had by the marriage might by possibility have inherited it as heir to her husband; and so in the case of curtesy, the issue actually born must have been such as according to the terms of the entail might inherit the estate as heir to the wife.

In Littleton's treatise on Tenures, sec. 52, it is laid down "that in every case where a man taketh a wife seized of such an estate of tenements, &c., as the issue, which he hath by his wife, may by his possibility inherit the same tenements of such an estate as the wife hath, as heir to the wife; in this case after the decease of the wife, he shall have the same tenements, by the curtesy of England, but otherwise not. And also, in every case where a woman taketh a husband seized of such an estate in tenements &c., so as by possibility it may happen that the wife may have issue by her husband, and that the same issue may by possibility inherit the same tenements, of such an estate as the husband hath, as heir to the husband, of such tenements she shall have her dower, and otherwise not." And he proceeds to state the case, if tenements be given to a man and to the heirs which he shall beget of the body of his wife, yet if the husband die without issue, the same wife shall be endowed of these tenements; "because (as he says) the issue which she by possibility might have had by the same husband, might have inherited the same tenements." And yet in this case and in every one in which tenant-in tail dies without such issue as could inherit the estate as his heir in tail, it would seem that the estate is determined except so far as in contemplation of law, and as was said in Paine's case with regard to curtesy, by privilege and benefit of the law, it is prolonged or continued for the sake of the wife's dower.

It is to be observed that Littleton says, in every case in which the wife might have issue which might inherit as heir of the husband, she shall be endowed. And al-

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In all cases where the husband is seized of such an estate in land as that the issue of the wife may inherit, if any she have, as heir to the husband, the widow is dowerable out of such estate: (Littleton on Tenures, Sec. 52,) whether any issue be born to the husband or not: (2 Atkins, 46, 1740; 3 Bos. & Pul. 654, in note, 25 Geo. 3d; 2 Bingham, 446, 1825; 2 Simons, 249, 1828; Bell on Property, 67 vol. Law Lib., 272; Bisset on Estates for Life, page 81, et. seq. Law Lib., side page, 38, et. seq.

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though Coke in his commentary upon this section, (40 a) mentions some exceptions to this rule, they seem to be founded upon statutes or on peculiar considerations not applicable to the case before us. Here W. L. Northcutt had in the land devised to him, an estate in fee, defeasible indeed, on the contingency of his death without leaving lawful issue, but which was an estate of inheritance in him up to the last moment of his life, and which unless aliened by him, not only might but must have descended on his death to any issue of the marriage then living. In the case of an eviction by title paramount or of entry for breach of a condition and other similar cases, the estate is absolutely at an end though the husband be living, and although he be dead leaving issue on other heirs, Here as in the case of an estate tail, the husband may rightfully enjoy the estate during his life, and at his death it is continued in his heirs if there be any of the designated character. And as the possibility that the wife might have had issue that might have inherited, be sufficient, though there be no such issue in fact to sustain the right of dower, it would seem clear upon analogy that under the rule stated by Littleton the possibility of such issue should sustain the right in this case of a defeasible fee in the husband.

But this conclusion does not rest solely upon the ground of analogy, nor is the rule laid down by Littleton now to be applied for the first time to an estate like that before us. The cases of *Sumner vs Partridge*, (2 Atkyns, 46, in 1740,) *Buckworth vs Thirkell*, (3d Bos & Pull, 654, in notes, 25th, Geo. III.) *Moody & Wife vs King*, (2 Bingham, 446, 1825, 2d Simons, 249, 1828,) in each of which either curtesy or dower was demanded, the right in each case was made to depend exclusively upon the question whether the issue of the marriage took or would have taken as heirs of the deceased wife or husband. In *Sumner vs Partridge*, curtesy was denied because in the opinion of the Chancellor, the children of the deceased wife took as purcha-

sers under the devise, and could not have taken by descent from her. In the case of *Barker vs Barker*, curtesy was also denied, because under the construction given to the devise, the children of the wife took as purchasers, and could not take the estate as her heirs.

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In *Buckworth vs Thirkell*, the estate was devised to trustees, in trust for M. B., till she attained twenty-one or married, and then to the use of her and heirs, with a devise over in case she should die under the age of twenty-one, and without leaving issue. M. B., married and had a child, so that the fee was in her under the devise, but the child died, and then the mother died under twenty-one. Lord Mansfield stated the rule from Littleton, and concluded by saying: "During the life of the wife, she continued seized of a fee simple, which her issue might by possibility inherit." And issue having been born, curtesy was allowed. As curtesy and dower are almost identical in respect to the nature of the estate out of which they may arise, the case just cited might be regarded as sufficiently in point to form a precedent for the one before us. But the case of *Moody and wife vs King*, being upon the question of dower itself, is more directly applicable.

In that case (2 *Bingh*, 447,) lands were devised to W. F., and his heirs forever, (charged with an annuity,) "and if W. F., should have no issue, the estate is on the decease of W. F., to become the property of the heir at law, subject to such legacies as W. F., may leave to the younger branches of the family." W. F., who was seized under the will and married, having died without issue, a bill was filed by his widow and her second husband claiming dower and an account, &c. The question whether the widow was entitled to dower out of the estate which W. F., took under the will, was referred to the Court of Common Pleas, and was decided in favor of the right of dower. In the opinion of the Court, the rule from Littleton is stated, as furnishing a test of the right of dower at once simple and just, and it is said, "The children of W. F., must have inherited

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an estate in fee simple indefeasible, had any survived him, and the executory devise would have been at an end; the case of his widow comes within the rule of Littleton." And it is added that, "It would be a strange anomaly that the widow of one whose issue can only be tenants in tail should be dowable, and she whose children would be tenants in fee by inheritance from their father, should not."

In Bissett on estates for life, pa. 81, and seq. (42nd No. Law Library, side page 58, and seq.) and in Bell on property, 272, (67th vol., Law Library, side page 186,) the rule is stated according to the doctrine of these cases. Upon principle and authority therefore, we are satisfied the true and substantial test of the right of dower is, that the issue of the wife by the marriage, might inherit the estate from the husband as his heir or heirs. And as W. L. Northcutt had in the lands devised to him immediately in fee, an estate of inheritance which must have descended on his death to any surviving issue of his marriage, we are satisfied that although he died without leaving such issue, his widow is entitled to dower in that land. But she is not entitled to dower in that portion of the land devised in the first place to the testator's widow for life, nor to distribution of the slaves or personalty devised to her husband, W. L. Northcutt.

Wherefore the decree is reversed and the cause remanded with directions to render a decree denying the claim of the complainants except as to dower in the land devised immediately to her first husband, W. L. Northcutt, and decreeing to Mrs. Whipp her dower in that land by proper allotment, and allowing her reasonable rents for the period during which it may be withheld from her.

Shuck for appellants; *Fox, Bell, and Robertson*, for appellees.

Portland Dry Dock and Insurance Com- DEBT. pany vs Trustees of Portland.

ERROR TO THE JEFFERSON CIRCUIT.

Debts. Corporations. Taxes. Interest.

Case 16.

June 21.

JUDGE MARSHALL delivered the opinion of the Court.

Case stated, and
pleadings, and
the judgment of
the Circuit
Court.

By the last section of the act of 1836, to incorporate the Portland Dry Dock and Insurance Company, (*Sess. acts, 1835-6, p. 587*), the said company was required to pay to the city of Louisville an annual tax of fifty cents on each hundred dollars of their capital stock. And as the capital was \$100,000, required to be paid up before the company should be organized or proceed to the business authorized by the charter, this tax amounted to \$500 annually. By the 7th section of an act of 1844, (*Sess. acts, 1843-4, p. 222*), the Board of Trustees of the town of Portland, were empowered to collect and receive for each year thereafter, two hundred dollars of the annual tax laid on the Portland Dry Dock and Insurance company; and so much of the act incorporating said company as directs the payment of an annual tax by said company to the city of Louisville, was so amended as to direct that in future said company should pay two hundred dollars of said annual tax to the Trustees of the town of Portland, and the residue thereof to the city of Louisville.

In April, 1847, the Trustees of the town of Portland, brought this action of debt against said company to recover the sum of \$200, the tax alleged to be due to them and unpaid for the year 1846. The declaration refers to the act of incorporation and the tax thereby imposed, and to the subsequent act granting to the Trustees of Portland \$200, part of said tax, and stating that the capital stock of \$100,000 had been subscribed and paid to the company, and that it had been fully or-

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12hm 77
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ganized and proceeded to exercise the powers and privileges conferred by the charter, avers that by virtue of said acts the company became liable and bound to pay to the plaintiffs as trustees, &c., for each and every year the sum of \$200, but has not paid to them the sum of \$200 which they are so liable and bound to pay for the year 1846, &c., &c.

To this declaration two pleas were filed, each of which was adjudged bad on demurrer, and the defendants saying nothing further in answer to the action, a judgment was rendered against them for \$200, with interest from the emanation of the writ.

In revising this judgment the first question is on the sufficiency of the pleas. One of the pleas simply avers in general terms, that prior to June, 1846, the corporation of the Portland Dry Dock and Insurance company, was dissolved by unanimous act of the corporation, and the capital withdrawn. The other plea relies substantially on the same fact more circumstantially set forth. It avers in effect, that the stock holders of the company at their June meeting in 1845, resolved to wind up their business and to divide their stock, and the directors of the previous year were continued in office for another year, viz: until June, 1846, for the sole purpose of liquidation, and the stock distributed among the stockholders, and the corporation dissolved and ceased to exist. This plea shows by way of profert the proceedings of the meeting of June, 1842, to which it refers, and by which it appears that said meeting received and unanimously confirmed a written authority and power of attorney, signed by all the stockholders, in which they express their desire to dissolve the corporation and close its business, and they appointed three named persons or any two of them, their attorneys, in fact, to collect the funds and assets of the corporation, and pay them over to each proportionably, as fast and as often as collected, and giving them power to settle and adjust all claims pro and con, to sell and dispose of all property of the company, and to compromise and

finally settle each and every transaction of said corporation, making use of the corporate name until each transaction is finally liquidated and closed. And the meeting of June, 1845, resolved accordingly.

Upon these pleadings the general question has been discussed whether a private corporation can at its own mere will dissolve itself by its own mere act. In England it seems to be the established law, that a corporation cannot effectually dissolve itself by a surrender of its franchise, unless the surrender be made to the King and accepted. Upon analogous principles the surrender in this country, should be made to and accepted by the Legislature, and it would doubtless be effectually evidenced by a repeal of the charter upon petition of the corporators. It is certainly desirable that there should be a Legislative act prescribing a mode by which private corporations might be dissolved by the act of the corporators, so manifested as to be conclusive, at least against themselves. Even in the absence of such a statute, we are not prepared to say that a corporation purely private in its character and objects and created for the sole benefit of the individual corporators, might not by the act of the corporation and the corporators be divested of its corporate privileges and existence, on the ground that the assent of the Legislature might in such a case be presumed, from the nature and object of the charter itself. But the act ought to be unequivocal and conclusive. And clearly, the corporation could not by its own act or that of the corporators importing a dissolution, be so dissolved as to discharge it from any contract or liability existing against it. And in this view, it might be questioned whether, as this company is chartered for twenty years, the annual tax imposed by the charter might not be regarded as such a continuing liability to the public as cannot be got rid of by any act of the company importing a dissolution, unless with the assent of the public.

But conceding, as we are inclined to do, that this annual tax is to be regarded as imposed upon the annual

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In England a corporation could not dissolve itself but by a surrender of its franchise to the King and its acceptance. In Kentucky it should be to the Legislature, or a repeal of the charter—*argu.*

—But in Ky. a corporation cannot, by its own act dissolve itself so as to avoid any responsibility incurred before such attempted dissolution.

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business and privilege of the Company, which should cease when the business and privilege are actually relinquished; and conceding further, without deciding that this corporation might, by its own act, terminate its corporate existence, and avoid future liability for the tax, we are still of opinion that each of the pleas is insufficient to bar the action.

1. Neither of them shows or avers an actual termination of the corporate existence prior to the year 1846, for which the tax is claimed, but each, in effect, admits its existence during a considerable portion of that year. And if a *pro rata* payment would suffice, neither of them avers it.

2. The general plea is also defective in not stating how or by what act the corporation dissolved itself.

3. The special plea shows that the organization of the Company was kept up at least until June, 1846, and that the corporate name was allowed to be used and may, for all that appears, have been in fact used for an indefinite period afterwards.

In this view of the pleas, we are of opinion that they do not necessarily raise the general question as to the right of the corporation to dissolve itself by its own act. And we do not decide that question, because if the right be admitted, the pleas do not show that it has been so exercised as to avoid all liability for the tax for 1846, claimed in the declaration. There was consequently no error in adjudging the pleas to be insufficient to bar the action.

It is contended, however, that if the pleas are bad, the declaration also is insufficient, and that the defendant was therefore entitled to judgment on the demurrer.

1. It is objected that the action of debt cannot be maintained for the demand disclosed in the declaration, but that if the plaintiff's are entitled to it at all, they should collect it as they do their ordinary taxes. But as the sum is certain and due by statute, and as debt is the ordinary remedy upon statutes, we do not perceive

Where a certain tax is imposed, debt will lie for its recovery: if a certain penalty be imposed by statute debt will lie for its recovery.

why if the defendants are certainly bound to pay the tax to the plaintiff's, the action of debt may not be maintained, even if they might resort to a more summary mode of coercion. If a statute prohibit an injury under a certain penalty to be paid to the party injured, he may sue for it in debt, though neither the right nor the form of action be expressly recognised in the statute, (1 *Chitty's pleadings*.) Much more, if the Legislature may require payment of a certain sum by one person to another, should the person entitled to it be allowed to maintain an action of debt against the party who being bound to pay it actually owes it. If the statute creating the liability had presented a different remedy, the case might be different. But the mere fact that the statute creating this liability calls it a tax, does not in our opinion preclude the remedy by action.

2. A more serious objection is, that as the original charter of this company directs the payment of the entire tax to the city of Louisville, the subsequent act which directs the payment of \$200 of the tax to the Trustees of Portland, is an alteration of the charter which is not binding upon the company unless accepted by them, and that the declaration is fatally defective in not shewing an acceptance, without which there is no liability on the part of the defendants to the plaintiffs. We do not perceive any difference between the burden or duty of making payment to the city of Louisville, of the whole tax, and of paying a part of it to Louisville and a part to Portland, unless it bein the fact that it is making two creditors and two demands with separate remedies, where there was but one originally. But we know that Portland though now a separate town was once incorporated with Louisville as a part of it, and is in the immediate vicinity of Louisville. From the name of the company too, it appears that the Dry Dock, the improvement and management of which was one object of the charter, was in Portland. And although the splitting up of a duty originally entire, and transferring to several a right which was vested in

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The act of the Legislature directing the payment of \$200, part of the tax imposed upon the Portland Dry Dock Company, to Portland, instead of Louisville, presumed to be acquiesced in by the Company from the facts and pleadings in the case.

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a single person, might under some circumstances, or even generally, be considered as an annoyance and operate in fact as an increased burthen, we cannot assume that it so operated in this instance, or that it was so regarded by the company. That this was not the ground of their objection to the demand of the tax by the Trustees of Portland, is reasonably clear from their failure to demur to the declaration, or to plead their non consent to the change made in the tax as a defence to the action. On the face of the pleading it may be inferred that they had acquiesced in the change and had probably paid to the town of Portland her portion of the tax for the years 1844 and 1845, for which years it is not demanded in the declaration. Under these considerations we feel authorised to assume that this change in the mode of paying the tax did not impose any additional burthen or inconvenience on the company, which is alledged to have been called on for payment; and as the Legislature had undoubtedly the right to take the tax or any portion of it from the city of Louisville; we are of the opinion that the objection to the declaration now under notice is not available.

A jury is not necessary in a suit to recover a tax fixed by law. — But no interest should be computed on such debt without the intervention of a jury.

The tax being a sum certain imposed by law not as a penalty but as a regular duty or debt, there was no need of a jury to ascertain the amount due, but we are of opinion that as this demand did not bear interest by law, the Court was not authorised to adjudge interest without the intervention of a jury.

For this error alone the judgment is reversed and the cause remanded with directions to render a judgment against the defendant for the sum of \$200 and costs without interest.

Guthrie and Ripley for plaintiff; *Loughborough & Ballard* for defendants.

Cole vs Hollister & Ross.

ERROR TO THE GREENUP CIRCUIT.

COVENANT.

Case 17.

Tender. Covenants performed. Pleading.

JUDGE CHENSHAW delivered the opinion of the Court.

June 21

COLE instituted his action of covenant in the Greenup Circuit Court against Hollister and Ross upon their covenant, which reads as follows :

The case stated, judgment &c.

\$3,333 33.

Three years after date we promise to pay A. Cole, or order, three thousand three hundred and thirty three 33-100 dollars, which may be discharged in good, merchantable pig metal, delivered on the bank in Greenupsburg, at twenty-nine dollars per ton.

**L. D. ROSS,
L. HOLLISTER.**

February 23d, 1847.

The defendants filed four pleas, to all of which the plaintiff filed demurrers. The Court sustained the demurrers to all the pleas except that of covenants performed; the plaintiff then withdrew his demurrer to this plea, and filed his replication thereto, which was joined by defendants. A jury was sworn to try the issue, and a verdict was found for the defendants. The plaintiff made his motion for a new trial, which was overruled by the Court, and he has brought the case up by writ of error.

Upon the trial it was substantially proved that the defendants about the first of January, 1850, caused to be weighed on the bank of the river in Greenupsburg, one hundred and fourteen tons, and twenty one hundred and some pounds of good pig iron, for Cole; and that about the 18th of February, one of the persons who weighed the iron, and who had been requested by

The proof in the case.

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Hollister to tell Cole his iron was ready, was at the house of Cole, and observed to him, "your iron is weighed up," but did not tell Cole, he was directed by Hollister to give him the information. It was also in proof that, within a few steps of the place where this iron was placed there were ten or twelve tons of other iron belonging to Hollister & Co., and that all the iron weighed up for Cole was still where it had been deposited. Proof was made also, that, about one o'clock on the 23d, day of February, Cole came to Greenupsburg and left about sun set.

Mofford, a witness who said he "had sold, and had iron to be paid to him," saw Cole on the 23d of February, and observed to him, "our iron is ready, and yours is down at the mouth of Sandy." Jackson another witness, stated, that Cole came to Greenupsburg on the 23d of February, 1850, about one o'clock, and told him he had come to town to receive his iron, and "employed him to show and explain the law of the subject;" that he did so, and told Cole "that he understood his iron had been weighed out for him, and put on the bank near the mouth of Sandy, but, that he thought the law required defendant or their agent to seek Cole and make the tender. Cole said he did not believe the defendant had the iron on the bank." It appeared also in proof, that Hollister & Co., had a house of business in the town of Greenupsburg, and that Joseph D. Collins, who was there that day, was doing business for them, and that in the conversation between Jackson and Cole, the fact of Collins being their agent was spoken of. This is all the evidence which it is necessary to notice, in order to a decision of the question of law presented in the record.

It is as clear to our minds that Cole was satisfied that his iron was ready, and that he did not desire to receive it, but, on the contrary wished to evade its reception, and convert it into money, as it is that Hollister & Ross wished to exonerate themselves by the delivery of the iron.

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The proof fully establishes the fact, that one hundred and fourteen tons, and twenty one hundred and some pounds of good pig iron were weighed and placed on the bank in Greenupsburg for Cole, about the first day of January, 1850; that it had remained there till the trial in the Court below, and that Cole, about the 18th of February, 1850, was informed that it was there, and also on the 23d of February, the day on which the covenant became due.

Will this proof sustain the plea of covenant performed? Will the mere fact of having the requisite quantity and quality of iron weighed, and deposited on the bank, and the fact that the obligee was informed of it by persons who disclosed no authority to give the information, amount to a performance of the covenant? Could any act on the part of Hollister & Ross, not sufficient to divest them of their right to the iron, and to vest it in the obligee, amount to a performance? Clearly not. And the facts enumerated would certainly not vest the iron in Cole. Hollister & Ross could, in our opinion, have gone at any time after the iron had been placed on the bank, and removed it, without incurring any responsibility to Cole. It was still their iron, and he could dispose of it as he thought proper.

And, to determine that the obligors had made a sufficient defence to the action by proof which did not show a divestiture of their right of property in the iron, would be, to determine that they had kept their covenant and could keep their iron also.

Had the plea been one of tender, instead of covenants performed, the proof, in order to sustain it, must have shown substantially that, on the 23d day of February, 1850, not only the proper quantity and quality of iron had been weighed and set apart for the obligee on the bank in Greenupsburg, but, that the obligors, by themselves or agent were there with it at the "utmost convenient hour" of that day, ready and willing to deliver it, but that the obligee refused to accept it, or failed to attend to it. See *1st Bibb*, 452; *2d Bibb*, 269; *4th Bibb*, 67.

To sustain the plea of covenant performed to an action of covenant upon a covenant to deliver property at a particular time and place, the proof must show that the obligee by himself or agent was at the place on the day of payment, and there remained to the uttermost

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convenient hour
of the day, ready
and willing to
deliver it, but
that the obligor
was not there or
refused to ac-
cept: (1 Bibb,
425; 2 lb., 289;
4 lb., 87.)

There was no proof in this case that Hollister and Ross, or either of them, or any one for them, were there with the iron on that day, ready and willing to deliver it. According to the testimony, the iron had been merely weighed and left on the bank, and that, in proximity to another pile of iron; and, without any one there to point it out, and tender it to Cole; had he come to the place to receive it, how could he ascertain what iron had been weighed out for him, or whether Hollister and Ross were then willing for him to take it?

Without deciding whether under the plea of covenants performed, the obligors could discharge themselves by proof which would sustain a good plea of tender, we are satisfied that the proof in this case is neither sufficient to sustain the plea of covenants performed, nor a plea of tender.

The first, second, and third instructions, asked by the plaintiff, and refused by the Circuit Court, being consistent with the foregoing views, and the instruction given being inconsistent with them, it results that the Court erred in overruling the plaintiff's motion for a new trial.

We deem it unnecessary to say anything in reference to the fourth instruction, moved by the plaintiff, except that we regard it as inappropriate.

Judgment reversed, and cause remanded, with instructions that the verdict and judgment herein be set aside, and a new trial granted.

Apperson for plaintiff; *Andrews & Cox* for defendants.

Brent's Ex'rs. vs Tivebaugh.**ERROR TO THE BOURBON CIRCUIT.***Usury. Executors. Joint action.***ASSUMPSIT.****Case 19.**

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

June 23.

THIS action of assumpsit was brought in the names of Jonathan Tivebaugh, Solomon W. Tivebaugh, Jesse Tivebaugh, and John Tivebaugh, against the executor of H. Brent, dec'd., to recover usury, which the plaintiff's alleged they had paid his testator in his lifetime.

The object of the bill.

It appeared from the evidence upon the trial that Jacob Tivebaugh died indebted to Hugh Brent in the sum of two hundred and ninety-one dollars, thirty-nine cents, a considerable part of which was usury. And that in September, 1841, after his death, the notes that Brent held for the debt, were taken up by Jonathan Tivebaugh and Solomon W. Tivebaugh, the executors of Jacob Tivebaugh, dec'd., and paid by them, by the execution of their individual note to Brent for the amount, in which note, the two other plaintiff's Jesse and John Tivebaugh also joined as co-obligors. The note executed by them was joint and several. It had been paid to Hugh Brent in his lifetime, as was proved by receipts endorsed upon it, and signed by him. The first payment of one hundred dollars, was made by Solomon Tivebaugh, another payment of the same amount was subsequently made by Jonathan Tivebaugh, as stated in the receipts. The receipts upon it did not show by whom the balance of the debt had been paid. There was no other evidence upon the trial in relation to the payment of the note, or the manner in which it had been made. The parties having dispensed with a jury and submitted the law and facts of the case to the Court, and a judgment having been rendered against the executor, he has prosecuted a writ of error to this Court.

**BRENT'S EXEC'RS
vs
TIVEBAUGH.**

The questions
presented.

Two questions are made in the case. First. Did the testimony authorize the plaintiffs in the Court below to maintain a joint suit for the money paid? Second. Did the transaction in 1841, amount to a payment of the usury, so that this suit which was not brought until more than five years after that time, was barred so far as its object was to reclaim that usury, by the statute of limitations, it having been plead and relied upon; or did the right to reclaim the usury arise upon the payment of the last note and not previously?

As it respects the first question, the right to maintain a joint suit, depended upon the payment of the usury by the parties jointly, or out of a joint fund. If the payment were made by two of them only, and not with money belonging to all of them, a joint suit could not be maintained by them. So far as the usury was paid by any one of the obligors, out of his individual means, he had a separate right to it, and could only maintain a suit for it in his own name. Did the evidence in this case authorize the presumption that the money had been paid by the obligors jointly or out of a joint fund? No such presumption in our opinion, can be indulged from the manner in which the payments were made, or from the nature of the transaction. It must be inferred from the facts proved that two of the obligors were the principal debtors, and the other two were sureties only. The two first payments credited, were made by the principal debtors, and the probability is, that they paid the balance of the debt. There was no testimony from which it can be inferred that the sureties paid any part of it, or that any part of it was paid with the joint funds of the obligors.

The doctrine is well settled, that a misjoinder of plaintiffs in assumpsit, is fatal to the action, and that no judgment can be rendered for them, if the evidence upon the trial fails to establish a joint cause of action.

In regard to the second question, it appeared in addition to the facts already stated, that when the executors of Jacob Tivebaugh executed their individual note for the debt of their testator, that Hugh Brent execu-

Two who were exec'rs. took up the note of their testator, which was given for usury, two others joined in the note as co-obligors—the note was joint and several; receipts upon the note showed payments in part by each of the executors; who paid the balance did not appear; a joint suit was brought by the executors to recover back the amount of the note paid off—Held that the inference from the facts appearing, was that the two first named who were the executors were the debtors, and the other his sureties, and no fact appearing to the contrary, the presumption was that the note was paid off wholly by the principals.

A misjoinder of plaintiff in assumpsit is fatal to the action, & no judgment can be rendered for them if the evidence does not show a joint right.

ted to them as executors, a receipt for its payment, for the amount of which they obtained a credit in a settlement afterwards made by them as executors. When did the right to demand the usury included in the debt thus settled first arise, and to whom does the right of action belong? It is evident that this usury was paid by the estate of Jacob Tivebaugh, dec'd., and the right to reclaim it was in his executors, and that they might have sued for it at any time after the settlement was made in which the estate was charged with it. They executed their note as individuals, that note was received by the creditor as a payment, they obtained a credit as executors for the amount, and consequently the usury was paid by them as executors, and not in their individual capacity when they discharged their own note, to pay which they had received an equal amount in money belonging to the estate. We are inclined to the opinion, that as executors they might have maintained a suit to reclaim the usury, immediately after the arrangement was made with Brent by which they paid the debt of their testator by the execution of their own note, even before they made a settlement with the County Court, and obtained a credit for the amount, but be this as it may, the debt was certainly paid by the estate of their testator, to whom the credit was allowed them, and their right to it after that event, was in the character of executors, and not in their individual capacity.

Wherefore the judgment is reversed and the cause remanded for a new trial and further proceedings consistent with this opinion.

Smith for plaintiffs; *G. Davis* for defendants.

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Executors giving their own note for usury claimed, against their testator may sue as executors for its reclamation, their right of action certainly accrues from the date when they are allowed a credit with the estate for such payment—probably from the date of their note, if the creditor execute a receipt to them for the debt.

CHANCERY.

Fetter, &c. vs Wilson, &c.

Case 20.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

Mechanics' Liens. Husband & Wife.

Case 23.

JUDGE MARSHALL delivered the opinion of the Court.

The case
started.

THESE bills were filed by various complainants to enforce alleged liens for materials furnished and work done upon a house in the city of Louisville, on the corner of Gray and Brook streets, alleged to be the property of Mrs. Catharine Fetter, wife of George G. Fetter, both of whom were made defendants. Their demurrers to the bills were overruled, and no answer being presented, a decree *nisi* was rendered settling the claims and requiring payment, which not being made, a sale was decreed of the house and lot being known by the numbers 144, 145, and 146, for their satisfaction.

This decree is objected to on the ground, 1st, that there is no allegation of the bills which authorizes a decree for the sale of Mrs. Fetter's interest in the lot. And, 2d, that if her interest could be sold, there is no ground laid for selling the three lots. And 3d, that George G. Fetter has no vendible interest.

It is not alleged nor in any manner shown that Mrs. Gray has a separate estate in the lot, or that she has or had any power over it, which the law does not allow to all *femes covert*, with respect to their lands. The most specific description given of her interest is in the statement that "the house referred to was erected on a lot of land in this city, which was conveyed by Mary O. Gray to Catharine A. M. Fetter, by deed dated 19th January, 1848, known on the plan of Gray's enlargement, by the Nos. 144, 145, and 146, which has a front on Gray street of 105 feet, and extends back 200 feet to an alley."

The deed not being exhibited we must assume from this statement, that the lot was conveyed to Mrs. Gray in the ordinary form.

The acts of the Legislature of 1831, and 1834, 3d Stat. Law, 409-411, under which these liens are claimed are understood as intending and operating to give the lien only upon the interest of the employer in the lot and premises on which the house is built or repaired, or at most upon the house and the interest of the employer in the lot and premises. And before Mrs. Fetter's interest in the lot can be brought under the lien, it must be shown that she was the employer of those who worked on the house or furnished the materials. But by the common law, she being a *feme covert*, was incapable of contracting for herself, and certainly could not bind her lands except by special acts done in a particular manner. Could she then in the legal sense become the employer of others to erect a building on her land or to furnish materials for it? She might unquestionably be the employer in fact for such a purpose. But as it is equally certain that she could not by such a transaction render herself legally liable to pay the price, it is the opinion of the Court that she could not be the employer in view of the statute, so as to subject her interest in the land, unless she had a separate estate in it with a power of charging it. Understanding these statutes as making no change in the rights or powers of married women, they could not have intended to recognize or enforce any act of a wife which was wholly void by the pre-existing law, and as by that law she could not bind either herself or her land by any thing short of a deed properly executed and authenticated, it follows that unless in directing the supply of work and materials for the improvement of her own land, she acts as the agent of her husband, or of others who might be liable on their personal contracts, there is no liability and no remedy for the price.

If it were conceded that the statute in using the broad term employer, may be understood as embracing a married woman, and as subjecting her interest to the lien for improvements made under an employment, by her, we are satisfied that it can only be extended to a case in which the wife is actually the employer, and

FETTER, &c.

WILSON, &c.

The acts of 1831 & 1834: (3 Stat. Law, 409 & 411) giving liens in behalf of mechanics, materials men, &c., gives the lien up on the interest of the employer, and the house, &c. A *feme covert* cannot be such an employer as to subject her real estate to the lien given by the statute, unless she have a separate estate in the land, nor can the husband give a lien on the wife's land by being the employer in the sense of the statute.

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that it cannot be extended to a case in which the husband is the actual employer, though with the knowledge and implied assent of the wife. The statute does not expressly refer to married women nor give them any capacity which they did not before possess. It is only by equitable implication that they may be embraced in the term employer which implies a capacity to contract. To say that the wife may be regarded as the employer, whenever it shall appear or may be inferred that although the work done or materials furnished for a building on her land, may have been directed by the husband and done or furnished for him, the wife knew of, and assented to, or did not dissent from his acts in the premises, would in effect be placing the interest of the wife under the control and at the mercy of the husband. This would be to extend the operation of the statute further than is authorized either by its terms or by its object and intent. In providing this lien for the security of mechanics and material men, it was not intended to relieve them from all care or caution, by subjecting the lot or land, on which their labor or materials were applied, absolutely to their demands. By limiting their lien to the interest of the employer they are placed under the necessity if they trust to this lien, of enquiring into the interest of their employer, and are put upon their guard against reckless undertakings for employers who have no interest in the realty or none which they can control, or to which a lien can attach unless by some act more solemn than a mere parol assent express or implied.

The third section of the act of 1846, "further to protect the rights of married women:" (*Sess. Acts, 1845-6, page 43.*) would seem to preclude the subjection of the wife's land upon any contract made during the marriage unless it be in writing by husband and wife jointly, and for necessities for herself or family, or unless it be provided for by their deed, acknowledged, authenticated, and recorded as required by law. This statute furnishes the means of security to undertakers of improvements on the lands of married women. But it

Since the statute of 1846: (*Sess. Acts, page 43.*) the right of curtesy of the husband in the lands of the wife is not subject to the lien of builders and material men, during the life of the wife, for the debt of the husband with out writing, such

would be inconsistent with its manifest import and intent, to subject the land of a wife, upon a mere implied liability, or even upon an express parol assumpsit, to pay for improvements on her land directed by the husband, or even by herself. The same statute prohibits the sale of the husband's curtesy, or life estate, during the life of the wife, for any debt of his; and if the contingent interest, dependent on his surviving his wife, may be sold, it certainly ought to be specifically described in the pleadings and in the decree of sale.

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as the statute requires.

There can be no separate sale of a house for improvements, &c. under the mechanics lien law

We are of opinion that the statutes conferring the lien, do not intend that the house shall be sold irrespective of the interest of the employer in it and in the lot; and therefore there can be no separate sale of the house. Whether the house, or any interest in it, can be subjected to any part of the present demands, otherwise than by sale, is a question not presented by the pleadings.

Under these views of the statutes referred to, none of the bills can be regarded as presenting a case for subjecting the interest of Mrs. Gray to the satisfaction of the claims set up. Not only is no writing from her and her husband set up or alluded to, but the allegations and exhibits render it entirely probable, if not certain, that the work and materials were furnished upon the sole authority and credit of the husband, upon whose interest there is no enforcible lien. The demurrers to the bills should, therefore, have been sustained. And even if a sale had been proper, it should have been confined to the lot on which the house was erected, and should not have embraced other lots, unless they were shown to constitute a part of the premises.

Wherefore the decree is reversed, and the cause remanded, with directions to sustain the demurrers, and dismiss the several bills and cross bills, unless so amended by leave of the Court as to present a case for equitable relief, in conformity with this opinion.

Morris for appellants; *Fry and Page* for appellees.

CHANCERY.

Wilder, &c. vs Smith.

Case 21.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

Liens. Equity Jurisdiction.

June 20.

JUDGE MARSHALL delivered the opinion of the Court.

The case
stated.

THIS bill was filed by Smith to enjoin a judgment obtained against him by Wilder & Co., as assignees of a note for \$300, executed to N. W. Buckner, for the last instalment of the price of a lot of ground in Louisville. The lot had been sold and a deed made to the complainant by N. W. Buckner as attorney in fact for L. J. Reardon, and Priscilla, his wife, of Arkansas, the fee being in the wife. But in consequence of the defective execution or authentication of the letter of attorney, a second deed in confirmation of the first, and conveying the lot, was made and duly acknowledged by Reardon and wife in person. Both deeds recite a consideration of \$800, "paid and secured to be paid." The bill states that \$500 of the purchase money was to have been paid in cash, and was in fact raised on a note executed by the complainant to W. T. Spurrier who obtained the \$500 and paid it to N. W. Buckner; and that the remaining \$300 were secured by the complainant's note to N. W. Buckner, payable in twelve months, which came by assignment to the defendants. The first named note is exhibited. The last is the foundation of the judgment prayed to be enjoined.

The bill suggests that the complainant is advised that if he should pay off said debt and take up said note, the transaction is such that he would not be able to show a release of the lien, and his title would remain under a cloud. He therefore prays that the money and interest due be received into Court and retained until Wilder, &c., the assignees, procure a release of the lien on said lot of land, and for an injunction to be perpetuated on final hearing. An amended bill charges that N. W.

Buckner, to whom the note was executed, was merely the agent of Reardon and wife, and had no interest in the lot.

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Upon these bills, an injunction was granted, and a demurrer to the bills having been overruled, the only question presented by the record, is, whether the facts alleged make out a case calling for the interposition of a Court of Equity, by injunction or otherwise, to withhold the debt.

It is to be observed that although the bill prays that the money due on the note may be received into Court, &c., it does not appear to have been in fact paid or tendered in Court, or to have been in any manner placed in the hands of the chancellor. And as there is no suggestion that the vendors have refused or are unwilling to make any proper release or acquittance upon payment of the note being made, the case rests simply upon the assumed right of the purchaser to withhold payment from the assignees of the note for the purchase money, until they procure a release from the vendors of their equitable lien upon the lot. And as upon the allegations of the bills, the vendors have no lien, but whatever lien they once had, passed with the note to the assignees, and will be extinguished by payment to them, the whole equity of the case rests upon the suggestion that in the form in which the complainant made the transaction, his payment and possession of the note for the purchase money now in the hands of assignees who were no parties to the transaction and are not even alleged to have had any notice of its nature, will not of itself furnish evidence of the extinguishment of the lien. It is not suggested that the vendors assert any lien, or claim the purchase money yet due, or that they will do so, nor is there any suggestion that they disavow the acts of their agent which are in effect confirmed by their deed, or that there is any real difficulty in proving that the payment of this note will discharge the debt for the lot and thus extinguish the lien, or that in the absence of such proof the complainant has suffered or will be subjected to any inconvenience. There

The lien of vendor for purchase money, passes to the assignee of the note given for the consideration, and is extinguished upon its final payment

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vs
SMITH

can be no danger from the vendors, because in asserting a lien they must show some evidence of the debt, and they have none, and can produce none. But as the deeds show that a part of the purchase money was unpaid at their date, it may be that should the vendee desire to sell the lot, he may be called on to show that it has been fully paid for. And because in the form in which he placed the transaction, there may be some trouble and perhaps expense in showing this to the satisfaction of others, he claims that this trouble and expense shall be incurred for his benefit, by the holders of the note for the purchase money before they shall be allowed to collect it. We know of no precedent for such a claim, and are of opinion that it has no foundation in equity.

Even in the case of a mortgage which creates an express lien and in fact conveys the legal title, we have never heard of a judgment at law for the mortgage debt being enjoined until the mortgage should be released, and simply on the ground that it was a cloud or incumbrance on the title. The vendors implied lien, a mere creature of equity for the prevention of injustice, is a much thinner cloud and vanishes altogether upon payment of the purchase money. It may be that after payment of the price, the vendee might under proper circumstances maintain a bill for a release or other evidence of the extinguishment of the lien. And it is possible that there might be circumstances which would justify the chancellor in preventing the coercion of the money until a release or other sufficient acquittance should be ready for delivery. But the mere existence of the lien created in equity for the very purpose of securing payment and which is *ipso facto* extinguished by payment, cannot of itself be a sufficient ground for enjoining the collection of the money until the lien is released. The deeds in this case showing that the sale was made by N. W. Buckner for the vendors, Reardon and wife, render it just as easy to identify this note with the price of the lot as if it had been executed to the vendors themselves; and there is no more ground for.

Where a conveyance has been made of land, expressing on its face to be for a consideration "paid and secured to be paid," the vendee cannot withhold the purchase money unpaid, and require a release or conveyance, expressing full payment, upon the mere suggestion of the fact that the conveyance made does not show full payment.

enjoining the judgment, than there would have been if the note had been so executed. There are no peculiar circumstances of equity in this case.

Wherefore, the decree is reversed, and the cause remanded with directions to sustain the demurrer and dismiss the bill, unless upon leave it should be so amended as to present a case for the interposition of the Chancellor.

Fry and Page for appellants; *Speed* for appellee.

JARVIS
vs
WHITMAN &c

Jarvis vs Whitman, &c.

ERROR TO THE LOUISVILLE CHANCERY COURT.

CHANCERY.

Case 22.

Liens.

JUDGE MARSHALL delivered the opinion of the Court.

June 24.

It is doubtful, upon the statements of the answers, whether there was, at the filing of the bill, any debt due from the Rail Road Company to Whitman, which could be subjected to the complainant's demand against Whitman. But waiving this inquiry as one to which Eldridge, who was not before the Court, may have been a necessary party, we are of opinion that upon the facts appearing, there is no debt due from Whitman to Jarvis, and as Eldridge was not a necessary party to this branch of the case, the absolute dismissal of the bill was the proper consequence of this conclusion.

True, a judgment obtained against P. N. Jarvis, as the surety of Whitman, was satisfied by a sale of the land of Jarvis under execution, and in this state of things he obtained against Whitman, a judgment for the amount thus paid as his surety—which is the same judgment set up in the bill—and on which an execu-

The land of J was sold to pay the debt of W—J had a judgment on W for the security debt so paid, and a return of *nulla bona*. J mortgaged the land, he hav-

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ing the right to redeem the mortgage foreclosed, J, V, and the purchaser under execution being parties to the suit, & the land sold to pay the debt, the proper debt of J: Held that the payment by the sale of J's land, being for his own benefit, his claim upon W was extinguished.

tion has been returned, "no property found." But after the execution sale, Jarvis having the right to redeem, mortgaged the same land within the year allowed for redemption, for another debt of his own, making no reference to the execution sale in the mortgage. And upon a bill by the mortgagee, which is also silent as to the execution sale, and to which Jarvis and the execution purchaser were made parties, but never answered, although it is suggested that the latter has some claim, and he is called on to set it up, a decree of foreclosure and sale was rendered and a sale actually made of the same land for the mortgage debt and the mortgagee became the purchaser. The execution purchaser being a party, was concluded by this decree and its affirmance. And the effect was that he obtained nothing by his purchase, but the property of Jarvis, though first sold in payment of Whitman's debt, was afterwards sold in payment of his own debt; and the first sale being thus virtually nullified, either the execution creditor or the execution purchaser had a clear equity to have from Whitman the amount for which the land was sold under the execution. And Whitman being thus subject in equity to his original liability, the basis of Jarvis' judgment against him was taken away. And Whitman having satisfied the claim thus arising against him, it is he, and not Jarvis, who has paid the debt.

If the execution purchaser was in default in failing to set up his claim in the mortgage suit, Jarvis also failed to notice it in the mortgage, and in the suit for foreclosure. And the land having been sold absolutely under the mortgage, as his property and for his debt, the failure of the execution purchaser to set up his claim, created no equity against him in favor of Jarvis, who presumably got the benefit of his default in the absolute sale of the land under the mortgage. It is true the land seems to have sold at a sacrifice under the decree, and it is said that this was caused by the claim of the execution purchaser then asserted. But of this fact there is neither allegation nor proof. And besides, the

claim was concluded by the decree, and there may have been other causes why the land sold for only half of the estimated value placed upon it two years before.

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But the real question is between Jarvis and Whitman. And it is by the default of Jarvis that the sale of his land under the execution, has turned out not in fact to have paid Whitman's debt and relieved him from it, as it seemed in the first instance to have done. If he had stated the execution sale in the mortgage or shown it by way of answer in the mortgage suit, it would have been protected, and his demand against Whitman would have been indefeasible. By failing to do this, and by permitting the land to be sold absolutely for his own debt, and by taking the benefit of this sale he in effect withdrew his payment of Whitman's debt, and left him free to settle it as he could with the person entitled to it. If in the event Jarvis suffered loss, it is the result of his own default, and he, and not Whitman, must bear the consequences.

Wherefore the decree dismissing the bill is affirmed.

Spear for plaintiff; *Thruston & Pope* for defendants.

COVENANT.

Brown's heirs vs Wilson & Thomas.**Case 23.**

APPEAL FROM THE GRANT CIRCUIT.

Administrators. Heirs. Covenants.

June 24.

JUDGE HISE delivered the opinion of the Court.

Case stated.

THE defendants in this case, with others, as the widow and heirs of John Wilson, joined in a conveyance, with special warranty, of an interest which they held in a large tract of land on the Ohio river, to Robert Brown, on the 16th of January, 1827, and on the same day the defendants, with Judith Wilson, the widow, executed and delivered, a bond in the penalty of one thousand dollars, conditioned, "that if three of the children and heirs of John Wilson, deceased, (who were infants when the conveyance was executed) to wit: Prescilla Wilson, Georgetta Wilson, and Mary Master-son, should convey by a special deed, their interest in the land when they arrived at the age of twenty-one years, or as soon thereafter as they should be legally called on for that purpose, then the obligation to be void, else to remain in full force and virtue in law."

These infants having arrived at twenty-one years of age, and two of them not having conveyed their interest in the land, the plaintiffs, as the children and heirs of Robert Brown, deceased, the conveyancee in said deed, and the obligee in said bond, institute their action of covenant in the Grant Circuit Court, against Wilson and Thomas, as surviving obligors in the bond—Judith Wilson, the widow, having died; and assign as breach of the covenant, that said minors had not made special deeds conveying their interest in the said land, when they had attained to twenty-one years of age, or as soon thereafter as they had been legally called on for that purpose, averring that they had been legally called on for that purpose, but failing to aver the time when

the call was made, or whether it was made before or after the death of Robert Brown, deceased.

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VS
WILSON, &c.
Plea of del'ts.

The defendants, without taking advantage by demurrer of the fatal defects in the declaration, filed their plea, in which they aver that the defendants were only the securities of Judith Wilson, deceased, and that seven years had elapsed since the cause of action had accrued, before the suit was instituted, and they rely upon the statute limiting actions against sureties to seven years.

To this plea the plaintiffs reply that the defendants were not sureties, but principals; and that seven years had not elapsed, as averred in the plea—and upon this single issue the parties go into trial, introduce their proof, and the case is given to a jury, who return a verdict for the defendants, whereupon a judgment is rendered against the plaintiffs for costs of suit.

Reply of pliff &
judgment of the
Circuit Court.

The plaintiffs move for a new trial upon the usual grounds—this motion is overruled. Exceptions are taken to the opinion of the Court, the evidence certified, and the plaintiffs have appealed to this Court.

The defendants introduced and examined two witnesses, who, with others, had signed and were parties to the deed from Wilson's widow and heirs to Robt. Brown deceased, the father of the plaintiffs. Plaintiffs' counsel objected to their introduction, insisting that they were incompetent on the ground of interest, and the deed was produced and read as evidence to the Court, to show their attitude and prove their interest. The Court overruled the objection, and properly; as it is not perceived how their interest could be in any way affected by the result of this suit, whichever way it might be determined.

The declaration does not show that the plaintiffs had any cause of action at all, when their suit was brought. It is not averred when Robert Brown died; when the minors, who were to make deeds, arrived to the age of 21 years, or when they had been legally called on to make the deeds. It therefore does not appear but that

For a breach of a covenant to convey land which occurred in the lifetime of the obligee, the executor or administrator must sue—it after the death of the ob-

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ligee, the right
is in the heir to
sue.

the breach of the covenant occurred, and that the cause of action accrued upon this obligation, (which was for the conveyance of land,) in the life time of Robert Brown the obligee, in which case, the plaintiffs, his heirs at law, could not maintain this action at all. But the right of action for damages upon a breach of such covenant occurring in the life time of the obligee, would after his death pass not to the heirs, but to the personal representatives. The declaration is quite informal, at least, in not setting out the penal part of the obligation. The breaches are vaguely assigned, yet the defendants waiving all objections to the declaration, rely for defence upon the fact that the defendants are securities and protected by the seven years limitation. The plaintiffs take issue upon this plea, and the whole case is staked upon it.

The verdict not
so unsupported
by the testimony
as to authorize
the court to grant
a new trial.

Upon the evidence introduced, although not very satisfactory, the jury concluded that the defendants were securities of Judith Wilson, deceased, and not principals, and their finding was not so contrary to the evidence as to authorize the Court to set aside their verdict on that ground. One of the witnesses states positively as a fact within her own knowledge, that they were securities. Another states that he was so informed by Judith Wilson, the principal obligor, and whose name is first signed to the bond.

Assuming that the cause of action accrued upon the minors attaining the age of 21 years, and that the defendants were only securities; as it is clearly proven that Mary Masterson was the youngest of the three persons named in the bond, and that she had arrived at the age of 21 years on the 7th of February, 1843, and as the suit was not brought until the 29th April, 1850, it is clear that the plaintiffs' cause of action, if even they ever had any, which may be well doubted, has been barred by lapse of time. But it may be said that the cause of action did not exist or had not accrued, until a demand had been made, or until the parties named in the bond had been *legally called on* for the deeds, and

that as it does not appear from any proof in the cause, when such call or demand was made, or whether any had ever been made at all by the plaintiffs or their ancestor, that therefore the defendant's plea of limitation is not sustained, and the plaintiffs are not shown to be barred their remedy by lapse of time; that if a legal call upon the parties, or a previous demand for the deeds was necessary to give the plaintiffs a right to maintain their action on the obligation, that then, the time to make out the bar under the statute, should not commence running until after such call or demand should be made. That defendant's plea, in substance, admits that the demand had been made, and as a consequence, that the right of action had accrued at some time, and as they aver for their defence, that this time was more than seven years next preceding the institution of this suit the burthen of proof was upon them to show it, failing in which, their defence of course fails.

This view of the subject if its correctness be admitted, yet it does not follow that the judgment of the lower Court should be disturbed because the defence indiscreetly made to a declaration so radically defective as the one in this case, may have prevailed on insufficient proof, it does not, we think, follow that the judgment should be reversed at the instance of the plaintiffs, who even if it were done, could not recover upon their declaration, which does not by its averments show that they ever had any cause of action at all.

The judgment of the Circuit Court is not erroneous, as appears from the whole record. Wherefore the judgment is affirmed.

B. Monroe for appellee.

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vs
WILSON, &c.

Where the declaration is defective, if there be an issue of fact found against the plaintiff, it does not follow that the Court should grant plaintiff a new trial.

REPLEVIN.

Aulick vs Adams.**Case 24.**

APPEAL FROM THE PENDLETON CIRCUIT.

Replevin. Pleading. Jurisdiction.

June 26.

JUDGE CRENSHAW delivered the opinion of the Court.

Case stated

THIS is an action of replevin, brought by Adams against Aulick, for a hog, which was valued by two housekeepers to the sum of \$3 75. The property was taken by the Sheriff and delivered to the plaintiff.

The defendant filed two pleas in abatement; one upon the ground that the amount in controversy, being of less value than five pounds, the Court had no jurisdiction; and the other, that the plaintiff did not before the impetration of his writ, file with the clerk of the Court, an affidavit, stating the value of the property about to be sued for, and that he was entitled to the immediate possession of it.

Judgment of the Circuit Court.

To these pleas the plaintiff filed a demurrer, which was joined by the defendant, and sustained by the Court. And the defendant failing to make any further defence, a jury were sworn to enquire of damages, and they found a verdict for the plaintiff, upon which the Court gave judgment.

The only question necessary to be decided by this Court is, as to the validity of the pleas; and we have no doubt of their insufficiency.

The damages laid in the declaration in actions of tort determine the jurisdiction.

The point involved in the first plea was decided by this Court, in the case of *Singleton vs Madison*, (1 *Bibb*, 342,) and that decision has not only not been departed from since, but has been approved in several cases. The decision in that case is that the damages laid in the declaration, in actions of tort, give jurisdiction. And the Legislature, by an act approved February 12th, 1840, conferring jurisdiction upon Justices of the Peace in actions of trespass and trespass on the case, does not

change the law in this respect, but, on the contrary, confines their jurisdiction in such actions, to cases in which the *damages laid* do not exceed five pounds. But, if it did not so limit their jurisdiction, it would make no difference, because the jurisdiction given to Justices of the Peace by this act is not exclusive but concurrent. The damages laid in this case are \$75, and hence the first plea was not good.

AULICK
vs
ADAMS.

An affidavit was filed, containing all the requisites of the act of 1842, (3 *Stat. Law*, 503,) but the second plea assumes, that it was necessary before the impetration of the writ that an affidavit should be filed with the clerk, stating the *value* of the property about to be sued for. This was required by an act, approved February 18th, 1840, but was dispensed with by the act above referred to, approved 17th of February, 1842. Before the passage of this latter act, it was necessary for the plaintiff to execute bond in the clerk's office, in a penalty double the amount of the property about to be sued for, and hence an affidavit of its *value* was required as the means of fixing the penalty of the bond. But, the act of 1842, instead of requiring the bond to be executed in the clerk's office, directs that it shall be taken by the Sheriff in the same penalty, and that the value of the property shall be ascertained by two or more disinterested persons, under an oath administered by the officer. This latter act repeals all others coming within its purview, and repeals, therefore, substantially, so much of the act of 1840, as requires an affidavit of *value* to be filed in the clerk's office. But the second plea is bad for another reason—no affidavit at all was necessary, if the property sued for had been distrained for rent, and this plea contains no averment that it had not been so distrained.

Since the act of 1842 it is not necessary to file an affidavit of the value of property sued for in replevin.

It results that the Circuit Court decided correctly in sustaining the demurrer to the pleas, and in giving judgment for the plaintiff upon the verdict of the jury.

Wherefore the judgment is affirmed.

Curry for plaintiff; *Swope* for defendant.

WILL CASE. Minor's heirs, &c, vs Thomas, &c., of color.

Case 25.

APPEAL FROM THE SCOTT CIRCUIT.

Wills. Incapacity of testator, &c.

June 30.

JUDGE HISE delivered the opinion of the Court.

The case stated.

A paper dated the 9th of April, 1839, was on the 15th of March, 1841, produced and offered in the Scott County Court for record, as the last will and testament of Jeremiah Minor, deceased, which after the examination of witnesses was rejected by that Court. This decision was, by writ of error, brought into the Scott Circuit Court for revision, and upon a re-examination of witnesses in that tribunal, the judgment of the County Court was reversed, the said paper adjudged to be the last will and testament of Jeremiah Minor, deceased, and ordered to be recorded. From which judgment of the Scott Circuit Court, the heirs and representatives of Jeremiah Minor have appealed to this Court.

By this paper, if regarded as a valid will, the testator emancipates all his slaves, and gives to them all his land, a tract of 350 acres, as well as the greatest part of his personal property. The due execution of this paper as the will of Jeremiah Minor, in conformity with the statute of wills is not controverted.

Questions for decision in this Court.

The questions presented are, 1st, was or was not the deceased of sound mind and memory, at the time this will was made; or in other words, had he then sufficient capacity to make a rational testamentary disposition of his estate?

2d. Was, or was not the execution of the paper procured by the undue influence of the emancipated slaves, brought to bear upon the mind of the deceased, when enfeebled by illness and extreme old age?

The affirmative of both propositions is established by a decided preponderance of the proof presented in the record.

The only persons present when the paper was acknowledged, was the wife of the deceased, and the three subscribing witnesses, to-wit: Belfield Glass, and John and Burton House. Glass wrote the will when no other persons was present, but the testator and himself.—He states that the testator was between 90 and 100 years of age, that he was of sound mind and memory for a man of his age, but *scarcely competent* to make a will at the time this was written; this witness also relates facts and circumstances which of themselves would tend to produce doubt as to whether the mind of the deceased was not then so enfeebled, and his judgment and memory so impaired, as to amount to incapacity to conceive, arrange, and dictate a will, making a sensible or rational disposition of his estate. Burton House, another subscribing witness, states that he was a near neighbor, and well acquainted with the deceased, and had many opportunities of becoming well informed as to the condition of his mind. He further states that when he witnessed the will, and for several months previous thereto, he thought the deceased was of unsound mind, and incapable of making a will, or of transacting any ordinary business. The witness then, after relating some facts and circumstances upon which his opinion is founded, again says he believed the mind of the testator was *unsound* at the time the will was made, and so continued until his death. John House, also a subscribing witness, states that he now thinks, and thought at the time he witnessed the will, that the deceased had not mind enough to make a will, or any rational disposition of his estate, and gives a reason why he witnessed the paper, notwithstanding his opinion of the incapacity of the testator. He further states, that for five years next preceding his death, the deceased was a *perfect child*, and had not sufficient capacity to manage his own affairs or dispose of his estate. This

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vs
THOMAS, &c.

Facts stated,
from which the
Court decide
that the testator's
mind was so im-
paired by age &
infirmity that he
was not capable
of making a will.

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witness relates a number of facts and circumstances which would reasonably induce the opinion formed by him. Eight other witnesses who appear to be intelligent men, and most of whom had many opportunities of being well informed as to the state and condition of the testator's mind and body, give it as their opinion that at the date of the will in contest, his intellect and memory were so utterly enfeebled and impaired by old age, that he was not capable of disposing of his estate by will, or of transacting with discretion any business. And each of the witnesses state conversations and conduct of the deceased, and facts and circumstances with respect to the condition of his farm, business, and affairs, and in regard to the condition and conduct of his slaves which tend to show that their opinions were well founded, and which exhibit an almost entire wreck and prostration of the intellectual faculties of the deceased. In opposition to this mass of evidence, is the testimony of Wm. Riddle, who states that he always thought that the testator was competent in mind to make a will, that he was a man of very fine mind, made his own contracts, and was *unusually smart*. This evidence is so flatly contradicted by, and so utterly inconsistent with the testimony of ten other witnesses, who appear, from the character of the proof made by them, to be men of considerable intelligence, as to raise a doubt of the sincerity and candour of Mr. Riddle's statements.

The only other witness introduced in favor of the will, is David Hudson, who, without expressing any opinion as to the capacity of the testator, merely states that he bought a sow and pigs from the old man, about three months previous to his death, that the old man asked five, and witness offered four dollars, which being a fair price, was accepted.

Upon the question of capacity or incapacity of the testator, in this case, two of the subscribing witnesses upon their testimony, condemn the will as the production of a mind rendered incompetent by disease and ex-

treme old age, the other subscribing witness and draftsman of the paper, in his evidence leaves it a doubtful question, at least as to the testator's capacity to make a will.

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THOMAS, & C.

Facts and circumstances from which the Court decide that the testator, who was between 90 and 100 years of age, and feeble in body & mind, was unduly influenced by his slaves to make a will by which they were to be emancipated, &c.

As to the second question presented, it is in proof that after his wife's death, the testator lived alone with his slaves, that they had unbounded influence over him, and controlled him at discretion. Various instances are given in the testimony of the witnesses, that tend not only to show that his slaves (who done as they pleased without check or control,) had great influence and control over the mind of the testator—but that this influence and control was actually exercised to procure the execution of this paper, by which his own legitimate offspring are almost entirely pretermitted, and by which the slaves take, not only their own freedom, but the entire real estate, and almost all of the personal property which belonged to the deceased.

It is proved that in 1835 & 1836, when his wife was living, that he had made and acknowledged a previous will, by which he gave his whole estate, including his slaves, to his own children. But when second childhood and complete dotage had overtaken him, this present will is produced, by which those very slaves are enfranchised, and who in exclusion of his own children, and the off-spring of his body, take nearly the whole of his estate. It is proven that his children were obedient and affectionate when with him, which excludes the inference that his slaves were preferred to them as subjects of his bounty on account of ungrateful or improper conduct. It is proven that Glass, who wrote the will, owned a negro woman who was one of the same family of slaves belonging to the testator; that he resided eight miles distant from the residence of the testator in a different County; that the information that the deceased wished him to come and write his will, was communicated to him at three different times by negroes, first by a negro man who was the husband of his negro woman, next by a free negro man, and the

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VS
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third time by a negro named Tom, one of the emancipated slaves.

The style and orthography of the document, (a *fac simile* of which is set forth in the record,) shows most conclusively that Glass, its author, was not much better qualified to compose than the testator was to dictate a last will and testament. Why should Glass, who had neither suitable qualifications, practice, or reputation for writing wills, be the person selected, in this single instance perhaps, to write the will of this imbecile old man, instead of his friend and near neighbor, Mr. Calvert, who was a magistrate, a man of respectability and intelligence, in whose integrity and capacity the testator had full confidence, and who had been for many years before, in the habit, at the request of the testator, of writing for him, and preparing his papers? The answer suggests itself, that the influence of testator's slaves may have caused his selection to perform a task to which he had never been accustomed, and for the performance of which he was so indifferently qualified.

John House states, without qualification, that the slaves had unbounded influence and control over the testator, and relates various instances to show the correctness of his opinion.

Martin Bramblett, who appears from the character of his testimony to be a very intelligent man, states that his (testator's) slaves, and especially old Fan, the mother of the family, could make him do as they pleased; and gives a particular and detailed account of facts in corroboration of his opinion, and of the further opinion expressed by him, that the testator was not competent in mind to have made any important contract, or any rational disposition of his estate at the date of the paper before the Court.

Thomas B. Catlett gives evidence of like character, and after stating a number of facts too numerous to be repeated, expresses the opinion, as based upon his personal knowledge and observation of those facts, that during the last five years of testator's life, "he had

not mental capacity to have made any important contract, or any rational disposition of his property by will."

The testimony of Thomasson, Motherhead, Smith, Calvert, Sailor, and Sebree, is concurrent with and corroborative of that of the other witnesses; and it all tends to produce the conviction that the paper in contest was procured to be executed by an improper influence exercised by his slaves, upon the exhausted faculties and expiring intellect of an old man, bending under the weight of near one hundred years, and who, from a sense of utter helplessness, and a feeling of complete dependence upon these slaves, was rendered incapable of resisting that influence.

With this view of the testimony in this cause, It is the opinion of the Court that the paper in question is not the true last will and testament of Jeremiah Minor, deceased, and that it was properly rejected by the County Court of Scott.

Wherefore the judgment of the Scott Circuit Court is reversed, and the cause remanded for that Court to affirm by its judgment, the order of the Scott County Court by which the said paper was not received as the last will and testament of Jeremiah Minor, deceased, but properly rejected.

Robinson & Johnson for appellants; *Duvall* for appellees.

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vs
THOMAS, &C.

ATTACHMENT

Weathers vs R. Mudd.**Same vs J. Mudd.****Case 26.****APPEAL FROM THE WASHINGTON CIRCUIT.***Attachments. Damages.***July 1.**

JUDGE CRENSHAW delivered the opinion of the Court.

The case
stated.

These two cases depend essentially upon the same principles. In October, 1850, the appellees sued out attachments at law against the appellant in the county of Washington, which were levied upon several slaves. The appellant gave bond, and replevied the slaves. The attachments were returned to the Circuit Court of Washington, and at the October term, 1850, the appellant appeared and filed a notice, and entered his motion to quash the levy, and also filed a plea in abatement; the appellees filed replications which were joined, and a jury was sworn in each case to try the issue; the jury found for the plaintiff, but assessed no damages:—Whereupon the Court gave judgment for the amount claimed in the attachment, and ordered a sale of the attached property.

The appellant filed his bills of exceptions, by which it appears that he read to the Court, "the agreements between the parties on which the attachments were respectively sued out," and objected to the rendition of judgment by the Court without the intervention of a jury.

The bill of exceptions does not state what testimony was given to the jury, but shows the "agreements upon which the attachments were sued out," and that they were read to the Court, when he was about to proceed to render judgment.

We deem it unnecessary to notice the assignment of errors in detail. The agreements which were read to

the Court, involve inquiries into matters of fact, and upon them the Court had no right to render judgment without a jury.

Had the attachments issued upon notes or obligations for the direct payment of certain sums of money, the Court could have rendered judgment without a jury, but upon agreements in which the amounts are not certainly ascertained, he has no such right. The jury which was sworn to try the issue upon the plea in abatement, should have ascertained the damages. In all cases where an issue upon a plea in abatement is found for the plaintiff, the judgment against the defendant is final; and, if it be a case in which a jury is necessary to ascertain the damages, and they have omitted to do so upon the trial of the issue, according to the English practice, a *venire de novo* must be awarded, and the omission cannot even be supplied by a writ of enquiry. See *3d Sanders' Reports*, side page 211, note 3. But where the issue has been tried, as in this case, upon the plea in abatement, it would certainly be an inconvenient and unnecessary and expensive practice to require a *venire de novo*. It is certainly the best course, and one which comports more with the liberal practice in this country, being equally promotive of the ends of justice, to require simply, where the jury have omitted to ascertain the damages, that a jury to enquire of damages be ordered, and not a *venire de novo*.

The fourth section of the attachment law, (*3 Stat. Laws*, 47,) provides that, in cases where the attached property *has been replevied*, the Court shall proceed to try the suit as other cases, but confers no authority upon the Court to order a sale of the attached effects. Where the property attached *has not been replevied*, the fifth section of the same law provides, that it shall be sold and disposed of in the same manner as goods taken upon a writ of *feri facias*. In this case, the property having been replevied, it was irregular and improper in the Court to order its sale.

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WEATHERS

J. & R. MUDD.

The Court can not assess damages in suits upon articles of agreement where an inquiry into fact is necessary to ascertain the amount of damages.

The finding of the jury against a plea in abatement is final, and in cases where an assessment of damages is proper, the same jury should assess the damages: (*3 Sanders' Rep.*, side page, 211.

—But if the jury fail to assess the damages, a jury to inquire of damages, should be called, not a *venire de novo*.

Where property attach'd has been replevied, an order of sale is not proper.

WEATHERS

vs
J. & R. MUDD.

The levy of an attachment on slaves is not void, tho' there may be personal property other than slaves sufficient.

It would have been more regular for the Court to dispose of the motion which had been made to quash the levy, before proceeding to take other steps in the case; but it does not appear that the appellant ever called up his motion after it had been entered, and we suppose it was his own fault that it was not disposed of. Besides, it was made upon the ground that the officer had no right to levy upon slaves, when, as assumed, other personal property to a sufficient amount had been shown to him; and, if it be conceded that the fifteenth section of the execution law, approved, 12th February, 1828, applies to attachments, it is only directory to the officer, and does not render the levy either void or voidable. The appellant sustained no injury, therefore, in not having his motion formally overruled.

But the jury having omitted to assess damages, and the Court having erred in not ordering a jury to ascertain the damages, and in ordering a sale of the attached effects, the judgment is reversed, and the cause remanded with directions to set aside the judgment and order of sale, and for further proceedings in conformity with this opinion.

R. J. Browne for plaintiff; *Thurman* for defendants.

Hughes vs Hughes.

ERROR TO THE LOUISVILLE CHANCERY COURT.

Wills. Devises. Legacies.

CHANCERY.

Case 27.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

July 1.

This is a contest about the correct construction and legal effect of the following clauses in the will of John Hughes, deceased.

Case stated, and
the will to be
construed.

"I bequeath to Charles S. Hughes, Mary E. Hughes, and Sarah F. Hughes, children of Richard F. Hughes, deceased, *when* they become of age, or marry, one tract of land, beginning, &c."

"I also bequeath to Charles S. Hughes, when of age, one negro boy between fifteen and twenty years old. Also to Mary E. Hughes and Sarah F. Hughes, when of age, a negro girl twelve or fifteen years old. This property in the event of the death of any one or more of said children, the survivors to inherit."

The testator had four children living, and three grand-children, the same named in the foregoing devise, being the children of his deceased son, R. F. Hughes. And after having devised property to his children, and grand-children, he inserted the following residuary clause in his will:

"In finally settling up the business of the estate, each heir must be accountable for all personal property advanced to them, and which has not been mentioned heretofore, so that each one must equally participate—an account of which will be found with this will.—Should there be any property remaining after settling these up, the same is to be equally divided among my children, after my debts are paid."

On the part of the grandchildren, it is contended, that under the first clause, they acquired a vested inter-

12m 115
99 209
12m 115
108 304

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est in the land and slaves upon the death of the testator, with a right to their immediate enjoyment; and that under the last clause, they are entitled to participate in the residuum. The correctness of this construction of either of the clauses in the will, is denied by the plaintiffs in error.

To determine the legal effect of the devise of the land and slaves to the grand-children, it will be first necessary to ascertain the period referred to by the testator, when he directs that in the event of the death of any one or more of them, the survivors are to inherit the property devised. It is clear, considering the whole context of this clause in the will, the testator did not intend the devise over to the survivors to take effect on the decease of the prior devisee, under all circumstances whenever it might occur, but by applying terms of contingency to an event in itself certain and inevitable, it is manifest he intended to connect it with some circumstance, or restrict its occurrence to some period of time, thereby making it contingent. To what period then did he refer, prior to which if either of the devisees died, the property devised to him or her was to go over to the survivors? It must have been either the time of his own death, or of the marriage or arrival at full age of the devisees. In the case of an immediate devise, it is generally true, that a devise over in the event of the death of the preceding devisee, refers to that event occurring in the lifetime of the testator, yet this construction is only allowed to prevail where there is no other period to which the words can be referred; because a testator is not supposed to contemplate the death of the object of his bounty in his own lifetime. But where there is another point of time to which such dying may be referred, (as obviously is the case here,) the words in question are considered as applying to the event of the death of the devisee at any time prior to the period referred to: 2 vol. *Jarman on Wills*, side page 665. On this principle the devise in this case must be construed to mean, if either of the devisees die before

he or she becomes of age or marries, the devise over is to take effect; but if the event do not occur before that period, *then* the devisee is to have an absolute and indefeasible title to the property devised.

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vs
HUGHES.

Such being the true meaning of the devise, the reference to the time *when* the devisees become of age or marry, is by legal construction supposed to have been made to designate the period when their interest in the property should become absolute and indefeasible. Although a devise to a person when he attains a particular age, standing alone would be considered as contingent, yet if it be followed by a limitation over, in case he die under such age, the devise over is considered as explanatory of the sense in which the testator intended the interest of the devisee in the property to depend on his attaining the specified age; and therefore the estate is construed to vest upon the death of the testator, subject to be defeated by the death of the devisee before the period arrives, when it is to become absolute and unconditional. There is also another class of cases in which a similar devise without any limitation over is so construed, that the words which import contingency and the creation of a future interest, are made to refer to the futurity of the possession, occasioned by the carrying out of a prior interest, and as pointing to the determination of that interest, and are considered as not used with a view to postpone the vesting of the estate.

A devise to one, 'when of age, or marry,' this property in the event of the death of any one or more of said children, the survivors to inherit: Held that the time of the death of the devisee or their marriage, was the point of time at which the contingency was to determine, and the right become absolute—& not the death of the testator.

But as the cases last alluded to, apply to a devise of a different description from the one contained in this will, we will only refer to those cases in which there was a limitation over, and which settle the doctrine that in such cases, the estate devised vests upon the death of the testator, although the expressions used seem to create a future interest.

In the case of *Doe on the demise of Hunt vs Moore*, (14 East, 601,) where the devise was to M., "when he attains the age of twenty-one years," to hold to him his heirs and assigns forever; but in case he should die be-

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fore he attained the age of twenty-one years, then over; it was held, the estate vested immediately, that the devise did not make the devisees, attaining the age of twenty-one, a condition precedent to the vesting of the interest in him, but the dying under twenty-one, was a condition subsequent on which the estate was to be divested.

The same construction prevailed in *Edwards vs Hammond*, (3 Lev. 132,) where A surrendered the reversion in fee in customary lands to the use of himself for life, and after his decease, to the use of his son H, and his heirs and assigns forever, *if it should happen that he should live until he attained the age of twenty-one years*, provided always and under the condition, nevertheless, that *if H died* before he attained that age, then the premises to remain to A in fee; it was held, that although upon the first words, this seemed to be a condition precedent, yet upon all the words taken together, it was an immediate devise to H, subject to be defeated upon a condition subsequent, if he did not attain the age of twenty-one years.

This rule of construction where there is a devise over, is further sustained by the cases of *Doe on the demise of Rooke vs Nowell*, (1 Mau. & Selw 327,) *Snow vs Poulton*, (1 Kean, 186,) and *Broomfield vs Crowder*, (1 Bos. & Pul. New Rep., 313.) See also 1 vol. *Jarman on Wills*, side page, 738.

—And that the devisee took an immediate interest upon the death of the testator, defeasible upon his or her death before marriage or arrival at the age of 21, and the right of possession also.

By applying this rule of construction to the devise under consideration, the devisees upon the death of the testator acquired an immediate vested interest in the land and slaves, defeasible upon the death of the devisee before the time specified, at which the estate was to become absolute. But although they take a vested estate, the question still arises, are they entitled to the immediate possession and enjoyment of the property? In that class of cases in which the testator has carved out a prior interest, and where, in making the posterior devise, words that are apparently creative of a future estate, and import a contingency, are construed as re-

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ferring merely to the futurity of possession, occasioned by the carving out of the prior interest, and as pointing out the determination of that interest, and not as designed to postpone the vesting, the same question cannot arise. But as the same words, in cases where there is a limitation over, are construed, not to refer to the time of enjoyment, but to the time when the limitation over fails, and the estate becomes absolute in the first devisee, the right of enjoyment would seem to be a legal consequence of the vesting of the estate, unless it be inconsistent with the other provisions in the will.

The same rules of construction should be appli'd in construing the clause of a will of personal property and land, where the same clause embraces both.

The title having vested in the devisees, the heirs at law have no right to the possession, nor can the executors take it in their fiduciary capacity, unless by an authority, express or implied, derived from the contents of the will. The only provision in the will, that bears at all upon the question, is the direction given by the testator that the devisees should be kept in his family, and supported and educated without charge, "unless their mother should determine otherwise, in that case his estate was not to be chargeable for their support." He does not appropriate to their support the rents of the land devised to them, but makes their support a charge upon that portion of his estate that his executors were to take into their possession, and makes no disposition, even by implication, of the rents of this land, accruing prior to their marriage or arrival at the age of twenty-one. There is nothing, therefore, contained in the will that supercedes their right as owners, to the rents of the land, the title having vested in them as devisees.

The bequest in relation to the slaves, differs however from the devise of the land, not only because of the different nature of the property, but also because the description or character of the subject of the gift refers to, and is regulated by the time *when* the legatees attain the age of twenty one. A distinction seems to be taken in some of the books, whether well founded or not we will not stop to inquire, between a bequest of personal property and a devise of real estate, (1 Vol.

Slaves bequeathed to be of a particular description when the legatee is 21 y's old, should not be set apart to the legatee, and he has no right to the possession until the age of 21.

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Roper on legacies, 386,) making words in a will when applied to personal property, suspend the vesting of the legacy, until the period specified, which when used in devising real estate, bear a different construction and produce another effect. We would however, barely remark upon this subject, that we can perceive no good reason why expressions in a will importing a contingency, may not be so explained and controlled by the context, as not to prevent a legacy of personal property from vesting, or why the same words when used in the same clause of a will, to dispose of real and personal property, should not have precisely the same signification and effect, so far as the vesting of the property depends upon their construction.

The bequest in this case, however, is not of a specific slave to either of the legatees, but of slaves that are to be of a particular description when the legatees arrive at full age. They are to be furnished by the executors out of the estate in their hands, and are then to be of the age mentioned. If it be conceded that the legacies vested immediately upon the testator's death, yet it is evident the testator intended to postpone the possession and enjoyment of them until the period specified. If the slaves are now furnished and set apart for the legatees, of the description mentioned in the will, they will not suit that description when the legatees attain the age of twenty-one; they may die in the meantime, and the testator's intention be thereby defeated, both as it respects the first bequest and the limitation over. By the express direction of the testator, the legatees are to be supplied with slaves of the description mentioned when they arrive at age. This bequest cannot be satisfied by a previous designation of a slave to be applied to that purpose, if the slave should die before the period arrives. The slave must be in existence at the time, and then suit the description given, in order to comply fully with the intention of the testator. We are therefore of the opinion that the legatees are entitled to the slaves when they arrive at full age,

and not previously; and as the estate necessary to enable the executors to satisfy the bequest, has to remain in their hands until that time, the profits arising from it, will belong to the estate, and be carried into the residuum, and not belong to these legatees.

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The testator in the last clause in the will directs his remaining property to be divided among his children. It is contended that the expression here used, does not include grandchildren, and therefore, that they take no interest in that part of his estate embraced in this residuary devise. The word children is construed not to embrace grandchildren, unless there be something contained in the will which manifests the testator's intention by the use of the word, to include not only his children, but also his grandchildren. In this clause he uses the word heir first, and then children, and seems to refer to the same persons throughout. He must be understood therefore, as having used the term children as synonymous with heirs. We think he intended to use it in that sense, and did not intend to exclude his grandchildren, especially as he says in the same clause, that in finally settling up his estate, it must be done so that each heir shall equally participate; not in the settlement merely, as we understand him, but in the balance of the estate, not previously disposed of.

The word children is to be construed not to embrace grandchildren unless there be something in the will requiring such a construction—a case in which the grandchildren are embraced by the term used—heirs for children.

In disposing of these questions in the Court below, the Chancellor gave the same construction to the will which has been given to it in this opinion, except that he made no discrimination between the devise of the land, and the direction concerning the slaves, but decreed that the devisees were entitled to the immediate possession and enjoyment of both land and slaves. In this we think he erred in regard to the slaves, and for this error alone, the decree must be reversed.

As it respects the cross errors assigned, objecting to the commissioner's report and the decree, for failing to allow rents on the land devised from the death of the testator, it is only necessary to remark, that it does not appear that any rents had accrued, or that the land was

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in a condition to yield annual profits. No testimony was adduced on the subject before the commissioner, nor any exception taken to his report on this ground. The cross errors must therefore be considered unavailing. But as the decree has to be reversed for the error indicated, an inquiry may be made upon this point upon the return of the cause to the Court below.

Wherefore the decree is reversed, and cause remanded for further proceedings and decree in conformity with this opinion. Each party must pay their own costs in this Court.

Clemons for plaintiffs; *Speed, and Williams & Graves,* for defendants.

**MANDAMUS. Graves, Judge of Fayette County Court,
 vs Cook's Administrator,**

Case 28.

ERROR TO THE FAYETTE CIRCUIT COURT.

County Court Jurisdiction.

July 1.

JUDGE MARSHALL delivered the opinion of the Court.

Case stated, and
 decision of the
 Circuit Court.

At a regular term of the Fayette County Court, held on the second Monday in June, 1851, by Benjamin F. Graves, who had been recently elected Presiding Judge thereof, the administrator of Sarah S. Cook, presented and offered to file a petition for the settlement of her estate, as an insolvent estate. But the Presiding Judge then holding said Court as sole Judge, refused to permit the petition to be filed in said Court, on the ground that it must be filed in his "Quarterly Court." The administrator petitioned the Circuit Court of Fayette County for a mandamus to compel B. F. Graves to allow said petition to be filed in the Fayette County

Court. The response of Graves admits his refusal to allow the petition to be filed in the County Court, as proposed, and maintains that the jurisdiction of the case presented by the petition, belonged to him as Presiding Judge of the Fayette County Court, at his quarterly terms provided by law, and not to the Fayette County Court, in which the application was made. A mandamus was awarded by the Circuit Court according to the prayer of the petition; and the sole question presented by the record, is, whether the cognizance of petitions for the settlement of insolvent estates, belongs to the Presiding Judge in the ordinary County Court, or to the same Judge in his quarterly Court.

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Prior to the passage of the act of March 11th, 1851, 'to organize County Courts in the several counties,' (Sess. acts, 1850-1, page 40,) the County Court, as familiarly known, was composed of three at least, and for some purposes of a majority of the Justices of the Peace commissioned for the County. These Justices had, severally, jurisdiction in civil cases upon contracts not exceeding \$50, and also in certain minor *torts*, and in certain preliminary proceedings in criminal cases; and for the exercise of their civil jurisdiction, they were required to hold regular quarterly terms or Courts. This jurisdiction may be designated as personal to each justice, and did not belong to the County Court, though composed of the Justices. But in addition to a very limited appellate jurisdiction in civil cases, and a very special jurisdiction of a criminal or *quasi* criminal character, that Court was vested with very important powers, of great interest to the community, and for the exercise of which, occasions were constantly occurring. Among these powers, were certain matters affecting the police of the county, the county revenue and its appropriation, also the establishment of roads, mills, ferries, &c., the probate of wills, the appointment of administrators and guardians, and settling with these and other officers. The present Constitution having prescribed a radical change in the organization of the Court, the de-

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tails of which were left to the legislation of the first General Assembly to meet after its adoption; the act, of 1851, above referred to, was intended to carry into effect the requisitions of the Constitution, on this subject.

The constitutional provision in regard to the jurisdiction of County Courts to be regulated by law.

And by the 2d section of the act of 1851, the County Court composed of the Presiding Judge, is to be held at the same times and places as the County Courts then were held, and exercise the same power and jurisdiction, &c. (except in laying county levy and expenditure of county funds,) as the County Courts had there before exercised.

The 33d section of the 4th article of the Constitution, declares that "the jurisdiction of the County Courts shall be regulated by law; and until changed, shall be the same now vested in the County Courts of this State." The second section of the act of 1851, declares that a County Court, composed of the Presiding Judge, (except when the Justices of the Peace are associated with him, as provided for in relation to county claims and expenditures,) shall be held at the same times and places as the existing County Courts are held, and shall have the same power and jurisdiction, &c. And besides providing for the exercise of these powers by the County Court, and identifying it in detail with the pre-existing County Court, it vests in the Presiding Judge the pre-existing jurisdiction of a Justice of the Peace, and enlarges the same in civil cases from fifty up to one hundred dollars, and provides that he shall hold quarterly terms in each year, which as already stated, had been required of Justices of the Peace for the exercise of their jurisdiction in civil cases.

As the act vests in the same officer and under the same official designation, distinct powers and jurisdiction which had previously belonged to two distinct and separate tribunals known by different names, it could scarcely be expected that in expressing the details necessary to be provided for, there should be perfect clearness and perspicuity. In the 16th and 17th sections of the act which relate particularly to the settlement of insolvent estates, there are various expressions which might be applied indifferently to the personal jurisdiction of the Presiding Judge as a Justice of the Peace, or to his jurisdiction as the successor of the old County Court; while there are other expressions which indicate that the proceeding is to be had in the County

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Court alone, and others again which would seem to exclude it from that tribunal. It would be a needless trouble, leading to no satisfactory conclusion, to attempt the ascertainment of the legislative intention by counting and weighing against each other; these apparently inconsistent expressions. If full force be given to each of them the result of their contradiction must be uncertainty and confusion. While there should be no doubt that those who passed, and at any rate those who framed the act, had in their minds a general purpose and idea in reference to which, the language and provisions of the act were to them, harmonious and intelligible.

If we confine our view to the 16th and 17th sections, we should not discover the general object and character of the act, and might find the construction more and more doubtful. But upon considering the whole act, we perceive that the object was to provide a successor to the pre-existing County Court, and to invest in that successor the powers also of a Justice of the Peace. We perceive also that the act gives to this new officer in one or the other capacity, a jurisdiction greater than had belonged to either or both of his predecessors. His jurisdiction in ordinary civil cases, or as a Justice of the Peace, is increased from \$50 to \$100. His jurisdiction subject to the control of the Circuit Judge and the Circuit Court, to direct the administration of insolvent estates on petition of the administrator or executor, and to authorize the sale of lands, when necessary for the payment of the decedent's debts, is as to amount of estate or indebtedness, unlimited. And the question is, in what character is he to exercise this jurisdiction? Is it given to him as a Justice of the Peace, or as the successor of the County Court and the recipient of its powers? A justice, as such, never had this power or any part of it. But the County Court not only had the power of making settlements with executors and administrators, which for many years had been exercised through its commissioners, but by an act of March 4th,

The Presiding Judge of the County Court as Judge of the County Court has jurisdiction to direct the administration of insolvent estates on the petition of the administrator, and to authorize the sale of lands when necessary for the payment of debts.

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1850, (*Sess. acts, 1849-50, page 42.*) it is provided that where the assets of an insolvent decedent's estate do not exceed \$500 by the inventory and appraisement, the executor or administrator may call all of the creditors before the commissioners to establish their claims, which shall be paid *pro rata*, subject to the supervision of the County Court, which is authorized to direct a sale of the decedent's land if necessary to pay his debts.

Here then was substantially the same power in the County Court and its commissioners, in cases where the assets did not exceed \$500, as is given by the 16th section, without reference to the amount of assets.

The County Court Judge by the act of 1861, stands in the place of the County Court commissioners, under the act of 1849-50, and his powers as Judge upon the subject are co-extensive with the old County Court, which Court, if the personal assets do not exceed \$500, might order a sale of real estate. By the 16th sec. of the act of 1851, the limit of \$500 is taken off, and the County Court Judge as Judge of the County Court proper, has the jurisdiction of settling estates and selling lands in case of deficiency of personal alty to pay debts. He has a separate jurisdiction as a Justice of the Peace.

The act of 1851, expressly puts the Presiding Judge in the place of the previous commissioners in making settlements. And it gives to the new County Court, consisting of the Presiding Judge alone, (except in the cases above designated,) the same powers that were possessed by the old. By this 2d section, the power of the former County Courts over the lands of insolvent decedents, whose personal assets did not exceed \$500, and of directing a *pro rata* payment of his debts, devolved upon the Presiding Judge as, and in the County Court. The 16th section takes off the limit, or in other words increases the jurisdiction, and prescribes the mode of notifying or calling in the creditors, and of trying or referring to the Circuit Court or its Judge, disputed questions.

There is nothing in the act which indicates an intention to diminish the jurisdiction of the County Court. The mere doubt whether certain expressions in the 16th and 17th sections, may not more properly refer to the Presiding Judge, acting as a Justice of the Peace, or personally, rather than to him as constituting the County Court, or acting in it, and even the certainty that they are inappropriate in this last application, cannot be deemed sufficient to change the clear and necessary import of the 2d section. But that section is entitled to control the loose and contradictory language of the

others. Then, when the assets of an insolvent decedent are not more than \$500, the Presiding Judge would have had, under the second section, jurisdiction in the County Court, and as the successor of the former County Court, and we think it may be assumed with reasonable certainty, that it was not intended either to take that jurisdiction away from the County Court altogether, or to give the jurisdiction to the same officer in a different tribunal or character, when the assets exceed \$500.

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We might quote strong words from the 16th section, to show that the proceeding was to be in the County Court. We do not, however, deem it necessary. We are satisfied that the jurisdiction given in the case of insolvent estates, is but an enlargement of the previous jurisdiction existing in the County Courts; and that as the enlarged jurisdiction given to the Presiding Judge in ordinary civil cases, belongs to him as a Justice of the Peace, and is to be exercised at his quarterly Courts, so the enlarged jurisdiction over settlements and the land of insolvent decedents, belongs to him as the County Court, and is to be exercised by him in that Court.

This question, and its decision, are of importance to the public, not only from the fact that the County Courts sit more frequently than the quarterly Courts, but also from the fact that the County Court has its clerk, and the laws provide for the careful preservation of its records, and that the proceedings under the 16th section of this act may become necessary muniments of title to real estate. These considerations are entitled to some weight, tho' they might not be decisive in giving construction to the statute. Nor is the suggestion to be disregarded, that the fees of the Presiding Judge, and perhaps the sufficiency of his compensation, depend, to some extent, upon the question whether cases of this character are to be cognizable in the County Courts, or in his quarterly Courts, in which he is his own clerk, and entitled to fees as such. Whether, under the construction which we have adopted, the Presiding Judge

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would be entitled to no fees except the allowance for making the settlement itself with the executor or administrator, is a question not presented. Whether, for the sake of giving him the fees of the entire proceeding, it should be transferred from the County Court to his quarterly Court, is a question for the Legislature, and not for this Court.

We are of opinion that the administrator had a right to file his petition in the County Court. Wherefore, the judgment awarding the mandamus is affirmed.

Graves for plaintiff; *Harrison and Hunt* for defendant.

FORC. ENT.
AND DET.

Case 29.

Allsup vs Hassett.

APPEAL FROM THE SPENCER CIRCUIT.

Practice. Bills of Exceptions.

July 2.

JUDGE MARSHALL delivered the opinion of the Court.

The case stated. In this case, the paper purporting to be a bill of exceptions, setting out the evidence and proceedings on the trial, was not signed or sealed by the Judge, nor spread at large on the record. There is an entry upon the record, stating that "the defendant tendered a bill of exceptions, which being signed and sealed by the Court, is ordered to be filed and made a part of the record." But the clerk, in reference to the paper copied as a bill of exceptions, states that from neglect, or some other cause, unknown to him, it was not signed by the Court. And the question is made whether the paper copied into the transcript before us, is to be regarded as a bill of exceptions.

The object of a bill of exceptions is, to place upon the record matters which otherwise would not appear upon it. And when properly authenticated, it is entitled to the same faith as evidence of the facts which it states, as the regular entries upon the record or order book of the Court. When the bill of exceptions is actually spread at large upon the order book, it stands upon precisely the same footing, and is entitled to the same verity as the other entries evidencing the acts and proceedings of the Court, and is, like the other entries, sufficiently authenticated by the signature of the Judge, made as usual at the end of the record of each day's proceedings: (*Hardin's Rep.*, 166.) The practice of spreading the bill of exceptions at large upon the order book, if it ever prevailed extensively in this State, was doubtless found to be exceedingly inconvenient and burthensome, and is now generally if not universally omitted. But it was dispensed with, in virtue of a consent of parties that the bill need not be copied on the order book, but should be filed with the papers and made a part of the record, and copied into any transcript which should be made out, &c. This consent is still set out by some clerks in making up the order for filing the bill of exceptions. But as it has become a matter of course to file the bill without spreading its contents on the record, the consent that it shall be so filed is sometimes omitted in the order.

A proper bill of exceptions, being of equal dignity and verity with any other part of the record, must, unless actually spread upon the record, have some peculiar authentication to identify the instrument and verify its contents. The seal of the Judge, as is evident from ancient statutes and authorities on the subject, or his signature and seal, constituted the essential part of this authentication, which could not be dispensed with unless the bill was actually spread upon the record. In *Washington vs McGee*, (3 *Dana*, 446,) the Court, in noticing the objection that the bill of exceptions was not sealed by the Judge, say, "A seal is not necessary when

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A bill of exceptions which is spread upon the order book of the Court, is entitled to full credit: *Hardin*, 166.

The signature & seal of the Judge must appear to every bill of exceptions not spread upon the order book.

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the bill of exceptions is spread upon the record, and made a part thereof, as in the present case." And in *Nancy vs Sneall*, (6 Dana, 148-9,) where the exceptions were taken at the proper time, and drawn up, and signed and sealed by the Judge during the term, but not being then spread upon the record were entered at a subsequent term *nunc pro tunc*, this was deemed a full compliance with the statute of 1798. And the Court say, "If entered on the record at the time, the seal of the Judge is not necessary; if not entered on record, the seal is required, and is sufficient of itself to authenticate the exceptions." In each of these cases, the objection was to the want of a seal, and it may be inferred that in each case the bill of exceptions was signed by the Judge. In the present case there is neither signature nor seal. And if it could be assumed that in speaking of the bill being or not being spread upon the record, the Court referred merely to the existence or non-existence of an order directing it to be filed and made a part of the record, still the cases do not intimate that such an order would be sufficient to identify and authenticate a paper without either seal or signature.

If it be true as stated in the entry in this case, that a bill of exceptions was tendered and being signed and sealed by the Court, was ordered to be filed, &c., the paper which has been copied does not answer the description, and is not identified, and therefore is not verified by the order. Being without signature or seal, it does not come up to the proper character of a bill of exceptions—is without the requisite evidence of its own verity and authenticity, and its title to credit rests solely upon the fact that it purports to be a bill of exceptions in this case, and is copied and transmitted by the Clerk as the bill of exceptions referred to in the order, though it lacks the essential requisites of the instrument therein described. If absolute credence is to be given to the record entry that a bill of exceptions was signed and sealed, &c., then it is absolutely certain that the paper transcribed in the record before us, is

Though the record may state that a bill of exceptions was signed and sealed by the Judge, and made part of the record yet if the signature and seal of the Judge be not in fact placed to the paper, it cannot be regarded as part of the record.

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not the bill of exceptions referred to; and being without signature or seal or recognition by the Court, it has not the slightest claim to the character and credence of a record. It is not *per se* a bill of exceptions, and it derives no aid from the record entry, because it varies most essentially from the instrument therein described. If then the entry of record is partly false, how far is it entitled to credit? If the Clerk made a false or mistaken entry upon the order book, how far shall his opinion that this paper is the bill of exceptions referred to, be relied on for its identification? And is the paper to acquire the character and verity of a record from the opinion or statement of the Clerk contradicting the record itself?

This may be the real paper presented to the Court as a bill of exceptions, it may have been approved of by the Judge, and he and the counsel and the Clerk may have supposed it had been signed. But however we might be disposed to believe these facts, we are constrained to the conclusion that the paper can not be regarded as a bill of exceptions forming a part of the record. There is then no full record of the evidence and proceedings on the trial. And although there are two regular bills of exceptions presenting single points decided by the Court, they contain but a partial and limited statement of the evidence, not sufficient to show that the decisions complained of were erroneous to the prejudice of the plaintiff in error, or at least not sufficient to show any error for which the judgment should be reversed. It is true the plaintiff was allowed notwithstanding the objections of the defendant to read title papers, which being irrelevant in this action of forcible entry and detainer should have been rejected. But they were admitted under the express restriction that they were to be considered only in reference to the question of boundary. And although most of them seem to have had no application to that question as presented in this case, and may have been therefore a useless incumbrance upon the trial and on the record, we

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cannot in the absence of the other evidence, say that they misled the jury.

Wherefore the judgment is affirmed. But in taxing the costs recovered in this Court, the Clerk is directed not to charge the plaintiff in error with the cost of copying the title papers read in evidence by the plaintiff below, except the deed from Welch to said plaintiff.

Monroe and Riley for appellant; *Harlan* for appellee.

CHANCERY. McCawley's adm'r. vs Brown's adm'r. &c.

Case 30.

ERROR TO THE LIVINGSTON CIRCUIT.

Awards. Former adjudication.

July 4.

Judge Hise delivered the opinion of the Court.

The case
stated.

THIS suit was instituted by McCawley in his lifetime, and after his death revived by his administratrix against the administrator and heirs of G. A. Brown, dec'd., to enforce an award. It appears that McCawley had sued Brown in his lifetime to recover certain demands against him for boarding, services, &c., that Brown died before it was tried, and after Brown's death Wm. M. Maynadier and certain other persons jointly with him, executed a penal bond to McCawley conditioned to submit all matters in controversy between him and Brown, dec'd., to certain named arbitrators, and to abide by and perform their award. This arbitration bond was executed by said Maynadier several days before he had been appointed administrator of Brown's estate, and it would seem that neither of the obligors in said bond at its date

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An award not
made within the
terms of the sub-
mission is not
binding.

had any right or authority to bind the estate of Brown by any such agreement. But waiving the question as to whether the subsequent appointment of Maynadier would relate back to the date of the bond, and make it valid and binding upon him in his character as administrator, it is obvious that Brown's estate, either the personal assets in the hands of the administrator, or the realty descended to his heirs, could not be reached, nor would his administrators or heirs be bound by the award exhibited in complainant's bill, unless it had been made in accordance with the terms of the arbitration bond, and by the arbitrators therein named, which was not done. It appears that two of the three persons named as arbitrators in the bond, refused or failed to act as such; and two other persons were substituted in their place without any authority whatever from the administrator or heirs of Brown, dec'd., who made out the *ex parte* award in question. It seems that McCawley being conscious that this award thus procured to be made by persons of his own selection, in the absence and without the knowledge or consent of the administrator or heirs of Brown, dec'd., could have no validity, procures a man by the name of Jewett, and another by the name of Watters, to accept or ratify the said award in writing endorsed thereon, and signed by them as the agents of the administrator Maynadier, and of the heirs of Brown, dec'd. But the complainant has wholly failed to prove the agency of Jewett or Watters, which is denied in the answer of Dallam, the present administrator. And in fact Jewett's deposition is taken by complainant, but he proves that he had no authority as agent either of the administrator or heirs of Brown, dec'd., to accept or ratify the said award, and that it was expressly agreed at the time he signed the endorsement of acceptance that he was not agent, and was acting without authority, and that his acceptance of the award should have no effect unless subsequently ratified by Maynadier; the said award must be therefore regarded as a nullity, unless life and validity should be oth-

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That which has been previously litigated and settled by the parties, as evidenced by a dismissal of a suit by agreement, cannot be re-litigated.

erwise given to it, and it is attempted therefore to prove that Dallam, the present administrator, (Maynardier having been removed,) had, after his appointment, admitted the claim evidenced by this award, and promised to pay it. But the only witness by whom this proof is made, is successfully impeached, and shown to be unworthy of credit, by a number of witnesses examined indifferently on the part of both complainant and defendants. It is true that complainant anticipating that this award could not be sustained, has by an alternative prayer in the bill, asked that he may be permitted to go behind the award and behind the common law suit brought against Brown whilst living, and which was after his death *dismissed agreed*, and recover upon the original consideration upon which the demand was founded. And in this view the complainant in the bill states the consideration to have been for services rendered by McCawley for Brown, as agent in giving attention to a 1200 acre tract of land and ferry appurtenant lying on the Ohio river, at the mouth of Cumberland river. Sanders, the only witness by whom complainant attempts to prove the claim set up, makes out a state of case which would lead the mind to the conclusion that probably McCawley was indebted to Brown rather than Brown to him. It is true that McCawley was Brown's agent, and it is true that as such he gave attention to the said tract of land, but it is equally true that he collected the rents from tenants thereon, and sold and used timber cut and taken from the same in the absence of Brown, and not a doubt is entertained but that McCawley retained out of the rents and proceeds arising from the timber used and sold by him, a sufficient amount to compensate himself for his services as agent, so that it manifestly appears that the award attempted to be set up by complainant is invalid if not fraudulent, and no satisfactory proof is made that Brown deceased, was at the time of his death indebted to complainant's intestate. Wherefore it is the opinion of

this Court that the decree of the Circuit Court be affirmed.

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vs
JENNINGS, &c.

Grigsby and Newman for plaintiff; *Harlan* for defendant.

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ERROR TO THE HARRISON CIRCUIT.

Vendor and Vendee. Equity Jurisdiction.

CHANCERY.

Case 31.

JUDGE HISE delivered the opinion of the Court.

June 27.

Case stated

The complainant, Ammerman, instituted his suit in chancery in the Harrison Circuit Court, against Dickson and Jennings, and prays for appropriate and general relief, upon the following state of case, set forth with precision in his bill:

That he had purchased from Dickson forty-two acres of land for the sum of \$1575 00, which was conveyed to him by deed, with covenant of general warranty by Dickson, to whom complainant had paid the whole of the purchase money; that said Dickson had also sold ninety acres of land to one Hugh Levi; that this forty-two acres and the ninety acres of land, were parts and parcels of a tract of about two hundred and seventy-two acres, which had been sold and conveyed by the defendant, E. Jennings, to Dickson; that after he had paid to Dickson the whole of the consideration for the said forty-two acres of land, he had learned that Jennings had a lien reserved in his deed to Dickson, to secure the payment of the purchase money, and that, upon inquiry, he had ascertained that Dickson was indebted in about the sum of \$5000 for the said two hundred and seventy-two acres of land; that after deduct-

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ing the quantity of land sold to complainant and to Levi, there remains still belonging to Dickson about one hundred and forty acres, which complainant believes to be sufficient and ample security for the payment of the balance of the purchase money and interest still due from Dickson to his vendor, Jennings, provided it is all immediately made available; but that if, by delay, the purchase money due, with accruing interest, is swelled in amount, he apprehends danger that his forty-two acres of land will be made subject to the lien of Jennings; that under such apprehension, he caused application to be made to Jennings, either to collect his debt from Dickson, or otherwise confine his lien to that portion of the land yet owned by Dickson.

Decision of the
Circuit Court.

To this bill the defendant, Dickson, filed a demurrer, which, after argument of counsel, was sustained by the Circuit Court, and the bill dismissed.

The complainant, in substance, alleges that not until after he had purchased and paid for the land, had he been informed that it was incumbered by a lien in favor of Dickson's vendor, for the purchase money, and that \$5000 of the amount was unpaid. Of course, if the allegation be true, this important fact was concealed from him by Dickson, whose duty it was honestly and fully to disclose to complainant the condition of his title. If he had known that this lien existed, he would not have paid the sum of \$1575, the price of the land he purchased, unless upon condition of its being applied to the payment of that much of the debt due from Dickson to his vendor, and to that extent discharge his lien. It is the duty of Dickson to pay Jennings, and thus remove the incumbrance from the land which he sold to the complainant for a full price, which has been paid to him, and it is the duty of Jennings to proceed, at least upon request, as alleged in the bill, to enforce his lien upon the residue of the land still retained by his vendee, or otherwise proceed to collect his debt, and he should not wait until Dickson shall sell and convey portions of the land to others, and then afterwards, unless

the purchasers from Dickson shall pay his debt by *pro rata* contributions for that purpose, proceed upon his lien to subject the land for which they had already paid Dickson a full price.

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The case of the complainant, as set forth in his bill is one which presents as strong claims for equitable relief as that of a surety who, as is well settled, may apply to a Court of Equity to compel the debtor to pay his debt, if due, or to make provision for the payment thereof, so as to quiet his apprehensions or exonerate him from responsibility. (See 1st *Story's Equity*, 593.)

A vendor who has sold land, & for which he holds a lien, may at the instance of a sub-vendee of part of the land, be required to enforce his lien upon the unsold part yet held by the first vendee: (1 *Story's Eq.*, 593.)

It is true that complainant is not liable personally as a surety by contract. Yet his land, for which it seems he paid an adequate consideration, is liable and bound for the debt of another, for the payment of which he did not intend to become liable, and for which he did not know when he purchased that his land was liable. The case, as presented in the bill, is within the jurisdiction of a Court of Chancery, which is the only appropriate tribunal in which to seek and obtain relief in this and cases of like character.

Wherefore, the decree of the Circuit Court is reversed, and the cause remanded, with direction that the demurrer be overruled, and for further proceedings.

Curry for plaintiff; *Wall* for defendants.

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**FORCIBLE
DETAINER.****Case 32.****Fogle vs Chaney.****ERROR TO THE PENDLETON CIRCUIT.***Forcible detainer. Frauds, Statutes of.***June 28.****JUDGE MARSHALL** delivered the opinion of the Court.The case
stated, judgment
&c.

ONE Clayton having gone upon the land of Chaney, supposing it to be vacant, and commenced cutting trees for logs to build a house there, Chaney came to him on the same day, when a few logs had been cut, and warned him not to make any improvement there upon his land. Whereupon, as the evidence conduces to prove Clayton agreed to lease from Chaney, and go on and put up his house, and occupy the land until the use of it would compensate him for his improvement, or Chaney was to pay him for his improvement if he did not occupy long enough. Under this parol agreement, Clayton proceeded to make the improvement, put up buildings, cleared between four and five acres, and occupied the same until his death, about five years afterwards. The value of the improvement is estimated at from \$50 to \$100, and the annual value at \$10. Upon Clayton's death, his widow remained in possession for a short time, and claiming the land as her own, had 50 acres surveyed, including the improvement, and placed Fogle upon it as her tenant, &c. Chaney sued out a warrant of forcible entry and detainer against Fogle, and the jury in the country having found him not guilty, the case was taken by traverse to the Circuit Court, where Fogle was found guilty of the forcible detainer, and a judgment of restitution rendered against him, for the reversal of which he prosecutes a writ of error.

Upon the facts above stated, we are of opinion that the jury was authorized to find that Clayton obtained the possession from Chaney, and under a parol lease of

the tenor above stated. He had no possession, but was a mere trespasser when Chaney interrupted his cutting, this he in effect conceded by the arrangement under which he went on with his improvement. And he is to be considered as having entered into possession as the tenant of Chaney. Thus considered, he and those holding under him were liable to be removed from the possession by writ of forcible entry or detainer, for a refusal to surrender it on or after the expiration of the lease.

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But the lease was for no certain period, and would by its terms continue until the occupancy of the improvement compensated for making it, which according to the estimate of some of the witnesses, would be done in five years, but in the opinion of others would require ten. Our statute of conveyancing, (of 1796,) declares in effect that no estate in land for a longer term than five years, shall pass from one person to another unless by deed, &c. If this is to be regarded as a lease for not more than five years, then it expired about the time of Clayton's death, and the disclaimer of his widow who succeeded him in the possession, and her leasing it to another was certainly equivalent to a refusal to yield the possession, and constituted a forcible detainer under the statute. And if the lease though indefinite in its terms, is to be regarded as good for five years only, so that after that period the tenant if permitted to hold over, would become a tenant from year to year, requiring six months notice to terminate the tenancy, the disclaimer after the end of the five years, dispensed with notice to quit, and authorized this proceeding for a forcible detainer. The same conclusion follows, if it be assumed that the lease was for more than five years. For then it was either good for five years the consequence of which has been already stated, or it was good only from the beginning as a lease at will or from year to year terminable by six months notice which was dispensed with by a disclaimer in any one year, and certainly by disclaimer after the end of five years: (2 A. K. Marshall, 220. 1 Monroe, 128.)

One who enters & takes a parol lease, may be proceeded vs for forcible detainer after the lease expires.

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Hix.

Where a lessee enters under a parol lease for more than five years, it ends with the 5 years, and the writ of forcible detainer lies. If the tenant be regarded as tenant from year to year, a disclaimer of the lessor's title or assertion of title by the tenant, dispenses with 6 months notice to quit and forcible detainer lies.

Conceding then that a mere disclaimer in parol or in the manner stated in this case, would not if made within the term of a lease for years be a forfeiture of the lease, authorizing an immediate entry by the lessor and making the further detention of the premises by the tenant a forcible detainer; we are satisfied that this concession does not for the reasons already stated, preclude a recovery by the lessor in the present case. And as the instructions given by the Court were conformable with the principles of this opinion, and the evidence authorized the verdict; therefore the judgment is affirmed.

Smith for plaintiff; *Swopes* for defendant.

DEBT.

Bevil &c., vs Hix.

Case 33.

ERROR TO THE MONROE CIRCUIT.

Gaming. Consideration.

July 7.

JUDGE MARSHALL delivered the opinion of the Court.

The case stated. To a PETITION brought by Hix against E. Bevil and two others, on a note for \$65, the defendants pleaded three pleas, each relying upon the defence more specially set forth in the third, which presents, in substance, the following facts:

That in 1849, while the election of delegates to the late constitutional convention in this State was pending, and Barlow and Pendergrast were candidates for the office of delegate in Monroe county, the plaintiff, Hix, delivered a horse to the defendant, E. Bevil, upon an agreement then made between them, that Bevil should pay for the horse one dollar for every vote that Barlow

should beat his opponent ; that is, as many dollars as the number of votes given for Barlow, should exceed the number given for Pendergrast, and that Bevil executed and delivered to Hix a written obligation to that effect; that at the election Barlow received a majority of more than 300 votes, over and above the number received by his said opponent, and that afterwards Bevil re-delivered to Hix, and he received the horse, and surrendered the writing aforesaid to Bevil, who thereupon, in consideration of the premises, and upon no other consideration, executed to Hix the note for \$65, with the other defendants as his sureties therein.

Demurrers to each of these pleas were sustained, and a judgment for the amount of the note rendered against the defendants, who prosecute this writ of error for its reversal.

Confining our attention to the third plea, we are of opinion that although the horse was to remain the property of Bevil, whatever might be the result of the election, yet the price of the horse was hazarded, and in effect bet upon the election, since the result, which was uncertain, might be such that Bevil might have to pay nothing, or but a trifle for the horse, and Hix would lose the whole or the greater part of his value, or it might be such that Bevil would, according to the agreement, be bound to pay several times the value, which would be a corresponding gain to Hix. It is not necessary, in order to constitute a bet, that the hazard of loss should be equal on both sides, or that the amount hazarded should be equal. It is no objection, therefore, to considering this a bet, that Hix could not lose more than the value of his horse. He put that to hazard for the chance of gaining by the event a larger sum, while Bevil, for the chance of gaining the value of the horse, or a part of it, risked a larger sum, proportioned to the excess of Barlow's majority over the number of dollars which the horse was really worth. This was substantially a bet, and can scarcely claim to have been a device to avoid the appearance or character of a bet. And we think it entirely clear, upon the face of the plea, that

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It is not necessary to constitute a bet that the hazard should be equal on both sides. H sold a horse to B, to be paid for after the election of members to the Convention, B to pay \$1 for every vote that one of two candidates should get more than the other, but if the one was beaten in the election nothing was to be paid: Held that this was substantially a betting, and a note given upon a compromise by B to H for money upon no other consideration, could not be recovered.

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The betting on elections of members to the Convention may not have been specially provided for by statute, & no penalty attached to the act it is against the policy of the law and the Courts will not lend their aid in the collection of notes founded upon such consideration.

the re-delivery of the horse, and the execution of the note for \$65, was a composition by which the horse and \$65 note, were received in lieu of upwards of \$300, which might have been demanded. If this was not the case, there was no consideration for the note.

But the horse was re-delivered, and the note executed in consideration of the surrender by Hix of his claim to more than \$300, won by the bet or wager upon Barlow's majority. If this bet was illegal, then the claim of Hix growing out of it, was also illegal. And not only was it not enforceable by suit, but having been won upon or at a hazard, even so much of it as may have been actually paid, might be recovered back, if the hazard of an election be embraced within the term hazard, as used in the act of 1833: (*Stat. Law*, 758; *McKinney vs Pope's adm'r.*, 3 *B. Monroe*, 93; *Lytle vs Lindsey*, *Ibid*, 125.) And a change of the transaction, by which a note is given by the loser in lieu of the thing lost, does not change the character or principle of the case. *Brown vs Watson*, (6 *B. Monroe*, 589.)

The case of *Graves vs Ford*, (3 *B. Monroe*, 113,) however, decides that the term *hazard*, as used in the act of 1833, does not embrace elections, and therefore, that the remedies given by that act, or founded on its principles, do not apply to bets or wagers made upon elections. And it seems that there is no statute denouncing a penalty for betting on the election of delegates to the Convention. Still, as it is obvious that such bets have the same evil tendency as bets made upon the election of other officers, they do not become legal or entitled to the protection of the law, because they are not specially denounced by statute. The only consequence of the omission is, that they are not subject to the penalty. The illegality of such wagers does not arise solely from their being expressly denounced by statute, and subjected to a penalty or forfeiture, but also from their being against public policy, from their direct tendency to interfere with the proper exercise of the elective right, and to corrupt our institutions in their

most important element. Such a contract is essentially vicious and illegal, without any statutory denunciation. The penalties denounced against wagers upon all ordinary elections, evince the legislative sense of their illegality. The omission to extend the penalty by special act to the case of an election which has occurred but once in fifty years, does not relieve a wager upon that election from the character of illegality, which its effects upon the public interest and safety impress upon it.

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Then, although the loser might not be authorized to recover back at law or in equity, money or property which he had voluntarily paid upon this illegal wager, he may, on well settled principles, resist and defeat a recovery against himself, by showing that the claim asserted is founded on an illegal consideration, or is part of an illegal transaction, and inseparable from it. The Courts will not and should not lend the aid of the law for the enforcement of a contract, the object and effect of which is to violate the law, and to affect injuriously the public interests. And to avoid being made the instruments of effectuating contracts which are destructive of the objects and policy of the law, Courts allow the party sued, though *particeps criminis*, to show and rely upon the illegality of the demand, as an effectual defence. *In pari delicto potior est conditio defendentis*.

We are of opinion, therefore, that the third plea presents a sufficient bar to the action, and should have been held on the demurrer.

The bill of discovery, seeking a disclosure from the plaintiff in this case, does not seem to be properly before us on this writ of error. And we only remark that its dismissal on demurrer, will be no bar to the presentation of a similar bill, when the cause is re-instated on the docket, under this opinion, if the facts alleged in the third plea, should be denied by the replication.

Wherefore, the judgment is reversed, and the cause remanded, with directions to overrule the demurrer to the third plea of the defendants, and for further proceedings.

C. & L.R.R.Co. *Ellis and Kellie* for plaintiff; *B. Monroe, Gorin and*
 KENTON Co. *Rogers* for defendants.
 COURT.

MANDAMUS Covington & Lexington Railroad Company vs Kenton County Court.

Case 34

ERROR TO THE KENTON COUNTY COURT.

Corporations. Legislative Power.

July 3, 1849

JUSTICE SIMPSON delivered the opinion of the Court.

Case stated.

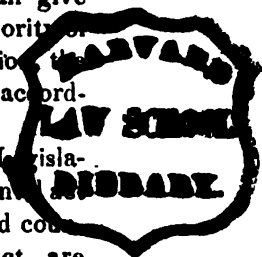
An act of the Legislature was passed in the year 1849, (*Sess. acts, 1848-9, page 382*), to amend the charter of the Licking and Lexington Railroad Company, by which the corporate name of the company was changed to the "Covington and Lexington Railroad Company," and in the eighth section of the act, it was provided that the counties of Kenton, Pendleton, Grant, Harrison, Scott, Bourbon, and Fayette, might subscribe to the capital stock of said company, not exceeding one hundred thousand dollars each, and might borrow money to pay the same; *Provided*, the real estate holders residing in each county, should by a majority, so vote, at such time as the County Court of each might appoint. The stock subscribed by counties, and the loans obtained by them to be charges upon real estate, to be determined by assessments upon the realty, made by the County Courts.

At the next session of the Legislature, (*Sess. acts, 1849-50, page 378*), it was enacted "that the counties of Kenton, Pendleton, Harrison, Bourbon, and Fayette, for the purpose of making payment of their subscriptions to the stock of said company which they are authorized to make, the County Courts of said counties shall levy and collect a tax on the taxable property within the jurisdiction of each, not exceeding over one-half

of one per cent per annum for five years, to be collected as the revenue tax is collected; *Provided*, that before a subscription shall be made, and the tax levied, the question of levying the tax shall be submitted to the voters of the county; and if a majority of the votes cast shall be in favor of the tax the same shall be levied."

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By the third section of the same act, it was enacted, "that the County Courts of the counties aforesaid shall appoint a day for the vote to be taken, and shall give sufficient public notice thereof; and when a majority of the votes cast shall be in favor of a subscription, the Court shall immediately subscribe the same, in accordance with the vote."



Afterwards, during the same session of the Legislature, (*Sess. acts*, 1849-50, *page* 580,) a supplemental act was passed, by which the County Courts in said counties for the purpose mentioned in the previous act, are directed to levy and collect a tax on the taxable property, within the jurisdiction of each, not exceeding one per cent. per annum for three years, to be collected as the revenue tax is collected; *Provided*, that before a subscription shall be made and the tax levied, the question of levying the tax shall be submitted to the voters of the county, and if a majority of the votes cast shall be in favor of the tax, the same shall be levied:

At the March term, 1850, of the Kenton County Court, it was ordered that a vote should be taken in the county for and against the proposed tax, on the first Monday and Tuesday in May, being the same time that a vote was to be taken upon the adoption of the new constitution; and the sheriff was directed to open a poll at the several places of voting in the County, and to propound to each voter the question: "are you for or against the railroad tax?" and to have the votes recorded as they were given.

The vote was taken upon the subject at the time appointed, and a considerable majority of the votes cast was in favor of the tax; but some of the votes as recorded were for the tax simply, some for one per cent., and some for one per cent. per annum for three years.

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At the May term, 1850, of the Kenton County Court, after the vote had been taken, the Railroad Company by its President moved the Court to make an entry on its records, that it thereby subscribed stock in said railroad, equivalent in amount, to one per cent. per annum, for three years upon all the taxable property in Kenton county on behalf of the owners of the property; and also to enter an order levying a tax of one per centum per annum, for three years upon the taxable property in the county; which orders the Court refused to make, and overruled the motion.

Rule for mandamus to Kenton County Court.

An application by petition in the name of the Railroad Company was subsequently made to the Circuit Court in Kenton county, for a *mandamus* against the County Court to compel it to enter up the orders as required, in obedience to the several acts of the Legislature amending the charter of the Company, and a rule was made by the Circuit Court, requiring the County Court to show cause if any it had, why the writ of *mandamus* should not issue according to the prayer of the petitioners.

The County Court made a return to the rule, and set forth therein, *in extenso* the reasons that determined it to refuse to enter up the proposed orders. Those reasons may be comprised under two general heads.

Substance of the return to the rule for *mandamus*.

First—That the acts of the Legislature conferred no right upon the Railroad Company, and imposed no duty upon the County Court, which was legally enforceable, because they were impolitic, oppressive and unconstitutional.

Decision of the Circuit Court up on the rule for *mandamus*.

Second—That under the several acts of assembly relating to the subject, the stock subscribed by the county was not to exceed one hundred thousand dollars, whereas the subscription of stock, to the amount of one per centum per annum, for three years on the whole taxable property of the county, demanded by the Company according to the proposed order would exceed two hundred thousand dollars. That the vote as cast was uncertain, and did not determine the amount of the tax,

but only that a tax not exceeding one per centum per annum should be levied, leaving the precise amount unsettled and undefined, and that according to a fair and reasonable construction of the several acts of the Legislature, the County Court had a discretion, if not to refuse to subscribe altogether, at least as to the amount to be subscribed, not exceeding one hundred thousand dollars, or if that was not the limit, not exceeding one per centum per annum, for three years upon the taxable property in the county.

The application for the writ of *mandamus* was heard at the July term, of the Circuit Court, and that Court being of the opinion that the County Court, had a discretion as to the amount of stock to be subscribed by the county, and was under no obligation to take stock, to the amount demanded by the Company, refused the writ, and discharged the rule against the County Court. From that decision of the Circuit Court, the Railroad Company have appealed.

Since the case was decided in the Circuit Court, an act has been passed by the Legislature, repealing the act and supplemental act aforesaid, amending the charter of the Railroad Company, so far as said acts relate to the county of Kenton. The repealing act is relied upon as having divested the County Court of all power to subscribe for the stock, and consequently as having deprived the Railroad Company of the right to require it to be done. We will in the first place consider the consequences of the repeal of the law under which the parties were acting, for it is obvious, if its effect be such as is ascribed to it by the opponents of the claim asserted by the Company, a writ of *mandamus* cannot now be awarded against the County Court, and the order of the Circuit Court, discharging the rule, ought not to be reversed, were it even conceded, that it would have been proper when the motion was tried, to have awarded the writ.

It cannot be denied that the Legislature possesses the power and the right, to take away by statute, what

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Question presented for decision.

The Legislature have the power to take away by

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statute what has been granted by statute, unless rights have vested under the law before its repeal or to revoke an authority given before any right has been acquired under that authority. And the repeal of a statute puts an end to all proceedings under it, unless rights have accrued under it which cannot be divested: (6 *Wendell*, 531; 2 *B. Monroe*, 402.)

The amendatory acts of the Legislature, for taking the vote of the people in Kenton & other counties in relation to a tax, to be laid for making the Cov. and Lex. Railroad, was a mere privilege to take the vote of the people as to their desire to become stockholders in the road, & conferred no rights which prevented the Legislature from repealing them.

But if this privilege has been so exercised that rights had been vested under its exercise, the Legislature had not the power to repeal so as to divest those rights.

has been given by statute, unless rights have vested under the law before its repeal. If the Legislature delegate an authority, it can certainly be revoked before the power has been exercised in such a manner as to create a vested right. Individuals have this right of revocation, and it must from its very nature exist in the Legislature, co-extensive with the right of the latter to delegate any of the powers properly belonging to that department of the government. A repeal of a statute, necessarily terminates all proceedings under that statute, unless rights have accrued under it which cannot be legally divested: (6 *Wendell*, 531, 2 *B. Monroe*, 402.)

The Legislature has the same power to repeal or modify acts of incorporation, until rights have accrued under them, unless the repeal would impose upon the corporation some additional burthens or liabilities, that it has to repeal or alter any other statute. The power to create necessarily implies its power to abrogate or annul, but the exercise of the power to accomplish the latter object is subject to constitutional limitations, imposed for the purpose of guarding against legislative aggression upon vested rights. Although therefore, the acts repealed, were amendments to the charter of the Railroad Company, yet if no rights had vested under their operation, and the powers conferred by them had not been fully exercised, and their repeal did not impose upon the company any additional burthens or liabilities, or deprive it of any certain or positive advantage, the Legislature had the right to repeal the amendatory statutes, and their repeal puts an end to all further proceedings under them.

Did then the Railroad Company acquire any vested rights by the passage of the acts amending the charter, or by any action that was had by virtue of their provisions? It is evident that they were not passed for the purpose of conferring upon the company any additional powers or privileges, nor did they purport a cession to the company of any corporate right. As amendments

to the charter, they were nugatory and inoperative until acted upon according to their provisions, and if the voters in the enumerated counties, refused to sanction a subscription of stock in the manner contemplated, they became useless and unprofitable. The only advantage the company could derive from them, consisted in having the question submitted to the voters in the respective counties, whether or not they would authorize the County Courts to subscribe for stock, and levy a tax for its payment. It was a mere right, if it can be properly denominated a right, to make application to certain counties to take stock in the road, an application which they might reject at their discretion, and from which, therefore, the company might never derive any benefit, and which consequently was an advantage merely in anticipation, and of a character too unsubstantial, ideal, and shadowy, to constitute a legal right or to be the subject of legal protection.

Although, however, the amendments to the charter did not *per se* secure to the company any certain privilege or advantage, the question still occurs, had such action been had under them as to create a right in the company, that could not be prejudiced constitutionally by legislation, and which rendered their repeal invalid? The authority which they conferred, to be operative, had to be exercised by both the voters of the county, and the County Court. The vote taken, amounted to an expression of assent on the part of the voters, that stock to some amount should be subscribed by the County Court. If under the charter as amended, the duty of determining the amount of stock to be subscribed, devolved upon the voters, that duty had not been performed. If on the contrary it devolved upon the County Court, it had a discretionary power as to the amount, which in effect invested it with unlimited control over the whole subject. If a general vote resulting in favor of the tax had the legal effect to impose upon the County Court the duty, and to give it the power of subscribing stock to the amount of one per cent per annum on

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The only question submitted to the people of Kenton was whether they were willing to be taxed not exceeding one per cent. for three years, leaving the rate below that per cent. to be fixed by the County Court, & until this was done, and a subscription made to the Railroad, the company had acquired no right which could be affected by the repeal of the amendatory acts, and therefore the constitutional right to repeal them existed.

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the taxable property of the county, the duty had not been performed, or the power exercised, and therefore no liability on the one side, or corresponding right upon the other had been authoritatively created, when the amendment to the charter was repealed. Regarding the voters as the principals in the transaction, and the County Court as their agent, and the law as determining the amount of the subscription, then what occurred might be considered as an expression of willingness upon the part of the principals to take a certain amount of stock in the road, accompanied by a positive and unconditional direction to the agent to subscribe for the same immediately. As however, the agent failed to make the subscription as directed, the stock was not subscribed and consequently no liability has been imposed upon the principals. And as the power under which the principals acted has been withdrawn, the authority to the agent has ceased also, and no further steps can be taken towards the accomplishment of the contemplated object. Until an actual subscription of the stock was made, no right to it vested in the company, and although if a legal duty had devolved upon the County Court, the performance of which would create and vest a right in the company, it might demand the performance of that duty for its benefit, yet when the law imposing the duty has been repealed, the duty itself no longer exists, and its performance cannot be enforced.

The voters not having fixed the rate of tax, the County Court had no and not having done so before the Legislature repealed the act giving the power to do so, it cannot now act in the premises.

But whether this conclusion be correct or not is not material in this case, as the language of the statute, in our opinion, forbids the interpretation, that by a general vote in favor of the tax, the amount was fixed by the charter as amended, at one per cent. per annum for three years on the taxable property in the county. The tax was not to exceed that rate, but its actual amount had to be determined either by the County Court or the voters of the county. The only question submitted to the voters by the County Court, was, whether "they were for or against the railroad tax." The railroad tax was not to exceed one per cent. per annum for three

years, but it might be less. The question as to the amount of the tax was not submitted to the voters, and consequently was not decided by them. If they, and not the County Court, had the legal right to decide it, another vote was necessary for that purpose. If it had been understood by the County Court and the voters, that a vote in favor of the tax should be regarded as a decision in favor of the maximum authorized by the statute, then it should have the effect intended to be given to it by the parties. But as the terms in which the question was submitted to the voters, do not necessarily imply such an understanding, and its existence was denied by the County Court, who claimed the right itself to determine the amount of the tax and the stock to be subscribed, the deduction that such an understanding existed, is wholly unauthorized and inadmissible. A controlling power then, over the whole subject still remained either in the County Court or the voters of the county; for until the amount of the tax was legally determined the right to do it still existed, and the exercise of the right might result in the reduction of the tax to a rate so low, as to render it of little or no benefit to the company.

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Viewing the case in all its various aspects, we are not able to perceive any right which had accrued to the company under the amendment to its charter, previous to the repeal of the amendment by the Legislature. Nor can we perceive that the company, by the repeal, has been deprived of any certain positive advantage, or subjected to increased burthens or liabilities. Nor does it even appear, nor was it alleged in the petition of the company praying for a *mandamus*, that the prospect, although uncertain, of obtaining from the county of Kenton, a subscription of stock to the full amount authorized by law, had induced the subscription of other stock, or caused the company to incur obligations or liabilities which it would not have otherwise incurred. No obstacle then existed to the exercise of the right of repeal by the Legislature, and the repealing

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act being valid, nothing further can be done under provisions which, though once contained in the charter, have ceased to exist.

The order of the Circuit Court, overruling the motion of the Railroad Company, and refusing to award a *mandamus*, should not, therefore, be reversed, even if it were erroneous when made, inasmuch as no other order could now be directed to be entered up. But it will be perceived, from the reasoning relied upon to illustrate the proposition, that the Railroad Company had acquired no rights under the charter as amended, at the time the repealing statute was passed, that the amount of the tax and subscription had not been definitely ascertained, and whether the power to regulate and determine it was vested in the County Court or the voters of the county, was immaterial, as in either case the power remained still to be exercised, and the company had no legal right to require the County Court to subscribe for its stock, to an amount equivalent to the highest rate at which the tax could possibly be fixed, and that consequently, whether the amendment to the charter was or not constitutional, the decision of the Court below was right upon this ground alone.

Wherefore the order of the Circuit Court refusing to award a writ of *mandamus* and discharging the rule against the County Court is affirmed.

Harris for plaintiffs; *Carpenter, Menzies, Stansifer, and Kinkead* for defendants.

Western vs Short.

APPEAL FROM THE CHRISTIAN CIRCUIT.

Mortgages. Warranty of title to Personalty.

CHANCERY.

Case 35.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

July 10.

WESTERN sold to Short a female slave and her child, at the price of five hundred dollars, which was paid. The former had purchased her from Imbler, who had, previous to the sale, mortgaged the slave to Green. A suit in chancery was subsequently brought upon the mortgage, and the complainant having made the appropriate allegations in his bill for the purpose procured an order requiring the sheriff to take the slaves into his possession unless the defendant Short, should execute a bond to have them forthcoming to abide any order or decree the Court might make in the cause. Short executed the requisite bond; and in the same suit filed a cross bill against Western his vendor, praying relief against him, in the event that the slaves were subjected to the payment of the mortgage debt. A decree was rendered, directing a sale of the slaves for the payment of three hundred dollars, and Short having failed to deliver them to the commissioner who had been appointed to make the sale; a suit at law was brought on his bond for a breach of its stipulations and a judgment recovered against him for the debt due upon the mortgage, the interest thereon, and the costs of the suit in chancery. Having paid the amount of that judgment, he amended his cross bill against Western stating these facts, and praying a decree against him for the amount he had been thus compelled to pay. Western answered and alleged that when he sold the slaves to Short, he was ignorant of the existence of the mortgage or that the title to the slaves was encumbered: that he had immediately upon the discovery of that fact, and before

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the suit on the mortgage had been instituted, made a proposition to Short to refund to him the purchase money, rescind the contract and take the slave back, which proposition he refused to accept. He contended that the slaves were of sufficient value at the time the decree was rendered in the suit upon the mortgage, to have paid that decree and also the purchase money which he had received for them from Short, and consequently that he was not liable to the latter for the amount of the decree. The Court below rendered a decree against Western on the cross bill for the full amount of the judgment at law against Short, including the cost of the common law suit; and from that decree Western has appealed.

A covenant of general warranty in the sale of land is broken by a recovery of dower against the vendee, and the measure of recovery against the vendor is regulated by the value of the dower interest: (5 B. Monroe, 341.)

The principle question is as to the extent of Western's liability to Short on his warranty of title. Had Short no right to redress unless he permitted the slaves to be sold to satisfy the debt due upon the mortgage, or had he a right to discharge the incumbrance, and look to his vendor for indemnity? Western was not entitled to a rescision of the contract, because he had sold the property without any knowledge that the title was incumbered, but it was his duty to have removed the incumbrance to secure the property to his vendee. If he failed to do it, his vendee had a right to do it himself, and in equity he became responsible to him for the amount he was compelled to pay to accomplish that object, unless the vendor was entitled to a rescision of the contract, he had no right to insist upon a sale of the slaves for the payment of the debt due on the mortgage, and of the purchase money due to his vendee. The vendee was entitled to the benefit of his purchase, and was under no obligations to surrender it for the advantage of the vendor, who had not according to any equitable doctrine a right to claim a rescision of the contract. The vendor was liable upon his warranty of title, for the purchase money and interest, if he had no title at the time of the sale; but as his title was valid to a certain extent, and could be made perfect by a re-

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removal of the incumbrance which the mortgage had created, the duty of effecting that removal devolved upon him, and determined the measure of his liability. In the case of *Davis vs Logan*, (5 B. Monroe, 341,) it was decided that a covenant of general warranty contained in a conveyance of land in fee simple, was broken by a recovery of dower by the widow of one previously seized, and that the value of the dower interest regulated the extent of the liability of the vendor upon his covenant of warranty. The cases bear some resemblance, and the views expressed in this opinion are sustained by the principles recognized in that decision.

The opinion heretofore delivered in this case, reversing the decree dismissing the cross bill, and remanding it for further proceedings, did not define or determine the rights of the vendee, or the liability of the vendor. But to manifest the right of Short to maintain his cross bill against Western, the Court remarked that "Short was entitled to the surplus of the proceeds of the sale of the slaves after satisfying the mortgage, and had a right to look to Western for the residue of the purchase money which he had paid him for them." The inference from which was that he could maintain his cross bill, to obtain a decree over against his vendor, but as the proper parties had not been brought before the Court the cause was remanded, for that purpose. The decree for the sale of the slaves had not then been satisfied, and the remark made by the Court, had reference to the then state of the case, and to the supposed event of a sale of the slaves to satisfy the decree; but no question was made, or opinion expressed by the Court in relation to the vendors right to have the slaves sold under the decree to pay the mortgage debt, and the purchase money due to the vendee.

Although however the vendee had a right to pay the balance due upon the mortgage, and thereupon compel his vendor to refund it to him, yet as the amount had been ascertained by the decree in the suit brought upon the mortgage to which suit Western was a party, it

W sold to S a slave upon which G held a mortgage. G brought suit to foreclose. S gave bond for the forthcoming of the property, but failed to surrender it to satisfy the decree. G brought suit upon the bond and recovered the amount of the mortgage debt, and costs of the suit in chancery and at law.— Held that W in a suit by S was not liable to S for the costs of the suit at law upon the bond for failing to deliver the slave, but only for the amount of the mortgage debt and suit in chancery to foreclose.

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was the duty of Short either to have paid the decree or to have surrendered the slaves that they might have been sold for its payment, and having failed to do either, and permitted a suit to be brought upon his bond for the forthcoming of the property, he cannot be allowed to hold his vendor responsible for the costs of that suit, and to that extent the decree against Western is erroneous.

Wherefore the decree is reversed, and cause remanded that a decree may be rendered in conformity with this opinion. The appellant is only entitled to one half of his cost in this Court.

McLarning for appellant; *Cates* for appellee.

TRESPASS.

Simon, &c. vs Gouge.

Case 36.

APPEAL FROM THE HARRISON CIRCUIT.

Trespass. Possession. Champerty.

June 28.

JUDGE MARSHALL delivered the opinion of the Court.

Case stated

18m156
106 596

This action of trespass was brought by Gouge against Simon and three others for entering upon the plaintiffs close in the county of Grant. The defendants pleaded 'not guilty,' and also a license from one De Bovis in whom the freehold was alleged to be. A verdict and judgment were rendered against the defendants for ninety-six dollars, and they have appealed to this Court.

Character of
 plaintiff's claim
 to the land.

The place in which the alleged trespass was committed is within the interference between the older patent of Phillips and Young for 56,000 acres, and the junior patent of Todd for 9187½ acres. The plaintiff is understood to claim under this latter patent, but shows no

derivation of title. For the purpose of showing boundary he read a bond from Todd, which is not copied in the record, and a deed from one Bartlett dated in 1833, for 600 acres of land within the patent of Todd which was also read, all of which covered the *locus in quo*. He also proved a possession of many years claiming to the extent of the bond and afterwards of the deed, but his residence and actual close was outside of the boundary of the elder patent until at some indefinite period probably between 1835 and 1839, he extended his improvement across that boundary and enclosed one half or three fourths of an acre within it.

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The evidence on the part of the defendants conducted to prove that as early as 1818, an agent for Moses L. Moses, claiming under the patent of Phillips and Young had executed a lease for the whole 56,000 acres to one Holbrook, then living on the land as a squatter. That Holbrook accepted the lease and continued to reside in the same tenements until his death in 1831; after which his widow remained in the same tenements for several years, when one Taylor purchased the improvement from her, sold it to another, repurchased it and continued in possession until 1835 or 1836 or 1837 when it was surrendered to the agents of the claimants under Phillips and Young, and the defendant Simon as agent for De Bovis who was one of these claimants took the possession and has continued to reside at the same place ever since. The defendants also read the patent of Phillips and Young and the record of a suit in chancery in which Moses L. Moses was complainant and B. P. Cruger and others among whom were the unknown heirs of Phillips and of Young were defendants, and in which there was a decree upon regular affidavit and publication for a conveyance, and a deed by commissioner dated in 1835, and approved by the Court conveying the title of the defendants in the 56,000 acre patent with certain exceptions to the complainant. They also read a deed from Moses L. Moses to De Bovis dated in 1835, after the commissioner's deed, conveying the

Character of defendant's claim.

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same land with the same and other exceptions, and also read a general power of attorney from De Bovis to Simon, authorizing all legal acts for the protection and advancement of his interest in the land. The exceptions in these deeds were proved not to cover the land now in controversy.

It was proved that in 1818, the place at which Holbrook lived was in the county of Pendleton which then included also the *locus in quo* and all the land now in contest; but that in 1819, the Legislature established the county of Owen, the line of which ran between Holbrook's and the land on which the trespass was committed, leaving Holbrook's place in the county of Owen. And that in 1820, the county of Grant was established including within its boundary the *locus in quo*, and leaving Holbrook's residence still in Owen. Whether Simon has at any time extended his actual close within the county of Grant is uncertain. But it appears that no entry was ever made under the elder patent within the boundary of Gouge's bond or deed prior to the entry which is complained of as a trespass.

Under the issue on the plea of not guilty it devolved upon the plaintiff to prove that he was in possession of the land when the defendants entered upon it. His entry outside of the older patent though evidenced by an actual close and continued residence, and made under claim of title to land extending within that patent and with the intention and claim of being possessed to the extent of his own boundary, did not give him possession of any part of the interference, though there may have been no possession either of the interference, or elsewhere under the elder patent. But an entry under the elder patent on any part of it with intent to take possession of the whole gives possession of all the vacant land within the patent boundary and in the same county in which the entry was made, although there be a junior patent covering part of such vacant land, and a possession under it outside of the interference. A prior entry however of, or under the junior patentee within the interference with intent to take possession of it, would

Plaintiff to maintain trespass *quare clausum fugit*, must have the possession at the date of the trespass—an entry under a junior patent outside of the interference, does not give a possession of the interference, though it be made with the intention of taking possession of the junior patent to the extent of its boundary. But a possession under the elder patent gives possession of all within its bounds not already possessed in the same county in which the entry is made; though

give possession to the extent of the interference which would not be divested or disturbed by a subsequent entry under the elder patent outside of the interference.

The principle that the purchaser of land adjoining a tract of which he has actual possession acquires by his purchase the possession of the land purchased, does not apply so as to extend his possession originally outside of an elder patent, to land within that patent, unless it was in the possession of the vendor, or unless the vendee actually enters upon it. And if the elder patentee has the possession of his land though by entry or enclosure outside of the interference the subsequent entry of the junior patentee within the interference does not divest the prior and existing possession beyond the actual close of the junior patentee though he may have been first possessed outside of the interference claiming to the boundary of his patent. But although the entry of the junior patentee is thus limited by his actual close, yet if his entry was made for the purpose of taking possession of the whole interference and be continued under claim of being so possessed, his possession might be extended to the whole or any part by the withdrawal or abandonment or other cessation of the possession under the elder patent.

Then the question whether, at the time of the trespass, the plaintiff had possession of the place, depends upon the question whether, when he extended his improvement over upon the interference, it was in possession under the elder patent, and whether, even if it was, that possession was afterwards withdrawn or abandoned, or had otherwise ceased before the entry complained of. If the lease to Holbrook was for the whole 56,000 acres, or was unlimited, and was made and accepted for the purpose of taking and holding possession for the lessor claiming under the elder patent, to the extent of its boundaries, the possession was thereby acquired of all the land included in the patent, which was in the same county, which was not in possession of others, and not covered by an older patent. And as the land now in contest was

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a prior entry under a junior patent within the lap with intent to take possession of it will give a possession to the extent of the interference.

An entry upon a possession under the elder patent, by a junior patentee, &c. with in the interference, does not divest the possession under the elder patent beyond the actual enclosure, though the junior patentee may have been previously possessed outside of the interference claiming to the boundary of his patent.

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then vacant, not covered by an older patent, than that of Phillips and Young, and within the same county with the actual close and residence of Holbrook, it was embraced within the possession thus acquired for the elder patent. If the lease was not of this character but was limited and did not include the land in contest, then of course no possession of this land was thereby acquired. And as at the time when the tenement which had been occupied by Holbrook was surrendered to the claimants under the elder patent it was in a different county from that in which the disputed land was, and is included, no possession of this disputed land was acquired by the surrender or by any act of the surrenderee done in any other county than Grant in which that land is situated; and no possession could be acquired for or under the elder patent even of vacant land in the county of Grant, except by an entry within that county. In that state of case the extension of the plaintiff's improvement or enclosure over upon the interference gave him possession to the extent of his boundary, and was sufficient to sustain this action unless the entry of the defendants for which it was brought was justified by title or license.

The creation of a new county & dividing a tract of land in possession does not have the effect of divesting a legal possession.

But if Holbrook's lease was as at first supposed unlimited and such as to give a possession of all the vacant land in the patent of Phillips and Young, we are of opinion that the subsequent division of the county of Pendleton so as to separate by the county line, the premises occupied by Holbrook from the land in contest, did not have the effect of limiting the extent of his existing possession, but that although his residence was thus thrown into the county of Owen leaving this land in the county of Pendleton, and afterwards in the county of Grant, no new entry or act was necessary in either Pendleton or Grant in order to give or continue his possession to its original extent. Upon this point the instruction given by the Court to the jury is in direct conflict with the opinion just stated, and is therefore deemed erroneous to the prejudice of the defendants.

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The question whether the lease (which was not produced,) was limited or unlimited, and for what purpose it was made and accepted, was one of fact, to be decided by the jury. Herndon the only witness who deposed to its contents represented it as being for the whole tract, and that Holbrook agreed to hold and did hold under it. The testimony of this witness was impeached by a witness who stated that on a former occasion Herndon had sworn that he did not recollect whether the lease to Holbrook was for the whole claim or only for his improvement, and by another witness who said that Herndon had sworn on the former occasion, that the lease to Holbrook was just like the others, and he believed he said that it provided that Holbrook should have the privilege of purchasing 100 acres of land. The instruction given by the Court, "that if the jury believed from the evidence, that the lease to Holbrook was confined to his improvement or enclosure, with the privilege of purchasing 100 acres, his possession did not extend beyond his improvement," seems to have been based upon this impeaching testimony; since there was no direct evidence of the contents of the lease but that of Herndon, given in this case and on this trial, and certainly no direct evidence of its providing for the purchase of 100 acres. The instruction as given was calculated to make the impression on the jury that they might regard this evidence of what the defendant's witness had formerly stated or his former statement itself, as direct proof of the contents of the lease, when in truth its only tendency was to discredit Herndon, and to weaken or destroy the effect of his statement made on this trial. If the jury believed the evidence of Herndon given in this case, it authorized them to find that the lease was unlimited and made for the purpose of taking possession of the whole tract. If they did not believe it, there was no evidence of an unlimited lease, nor of a possession co-extensive with the patent, acquired thereby, and the defendants failed in making out that part of their case. This instruction appears to be misleading.

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If a lease of the whole patent or without limits was made by persons acting for the patentees or those entitled under them to Holbrook, and was accepted by him while residing on the land, it would be presumed to have been made with intent to take possession of the whole, and had the effect of gaining such possession under the exceptions above stated. And such possession if continued up to the time of the surrender to the claimants or their agents in 1835-6, or 7, passed by the surrender to said agents, and so far as the present contest is concerned, to Simon, notwithstanding the intervening county lines; and while it so continued, as it might do by the continued residence and claim of Simon, it repelled any constructive extension of the plaintiff's possession within the elder patent, and confined it to his actual close.

A tenant placed in possession of a large tract of land, & died upon it, left a family, they were still in possession as the head of the family had been for the landlord—no act of abandonment appearing.

To whatever extent the possession was originally held by Holbrook under the lease, we are of opinion that it was not restricted to narrower limits by the death of Holbrook, leaving his widow in possession of his improvement, nor by her sale of the improvement to Taylor, who though he purchased nothing else, cut wood and timber as he pleased. The improvement was the only valuable or vendible part of the possession that the tenant could dispose of. The possession outside of the improvement was for the lessors if not in them, and may have continued as the tenement to which it was attached was held by their tenant or under or for them, unless there should be some fact authorizing the conclusion that the constructive possession had been lost or relinquished. The absence, from the time of the execution of the lease for many years, of any recognition by lessor or lessee of the existence of such a lease or of such a tenancy and extensive possession as have been referred to, and the failure to show any act done by either, asserting or evidencing such a tenancy and possession, and the sale of the improvement might tend to prove that no such lease had been authoritatively made and no such possession acquired; or that if acquired, it

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had been expressly or tacitly relinquished, and existed only to the extent of the actual enclosure of the Holbrook tenement when it was surrendered by Taylor some seventeen or eighteen years after the date of the alleged lease. It would seem that there should be some length of time which would authorize the inference that a constructive possession had ceased or been relinquished, which though extending to thousands of acres in different counties, is attached to a small tenement and sustained only by the occupancy of that tenement by a tenant without any other assertion or evidence of the extended possession than may be inferred from a lease in his pocket lost or destroyed, and never shown or spoken of after its execution, and not produced on the trial. And although it cannot be decided as matter of law that a presumption of relinquishment arises from such facts, we are inclined to the opinion that a jury would be at liberty, in the absence of opposing circumstances to find whether or not in view of all the circumstances, the constructive possession had been relinquished by the lessor.

Upon this branch of the subject no question was made on the trial so far as appears from the instructions given and refused, except as to the effect of the sale of Holbrook's improvement. But in the instruction that the constructive possession was narrowed down by the county lines separating Holbrook's tenement from the land in dispute, and the instruction that if Taylor purchased the improvement of Holbrook, his possession was confined to the improvement, the Court in effect decided that there was no possession under the elder patent within the county of Grant, as a consequence of the continued occupancy of the Holbrook tenement in Owen. Under these instructions, both of which are deemed erroneous, the jury was bound to find that the plaintiff was in possession of the interference when Simon and the other defendants made the entry complained of, and the defence rested solely on the question of a license justifying the entry.

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In making out their defence on the ground of license from Debovis, it was necessary that the defendants should show not only authority from him, but also title in him to make and authorize the entry upon land in the plaintiff's possession. *Prima facie*, the decree, the commissioner's deed from the unknown heirs of Phillips and Young, and others, to Moses L. Moses, the deed from him to Debovis, and the power of attorney from Debovis to Simon, are amply sufficient to show title in Debovis and authority from him to Simon to enter under that title.

A conveyance made in compliance with a valid contract, made when there is no adverse possession is not within the champerty laws.

But it was objected that the deed from Moses to Debovis did not pass the title to the land now in dispute, if, when it was made, the plaintiff Gouge was in the adverse possession of the interference, and several instructions were given upon this subject. The objection was certainly valid if the possession was adverse at the date of the deed and so far as it was adverse, unless the deed was made in pursuance of a binding contract, made when there was no such adverse possession.— But supposing no such previous contract, the question of the state of the possession at the date of the deed depends upon precisely the same principles that have been already stated as affecting the state of the possession at the time of the trespass complained of. And upon this subject the Court not only committed the errors before noticed, but also erred in the instructions which apparently authorized the jury to conclude that if at, and before the date of the deed to Debovis, the plaintiff was in possession under his bond or deed claiming to the extent thereof, this was such an adverse possession of the entire interference, as rendered the deed to Debovis champertous and ineffectual to pass the land in contest. To support this conclusion it was necessary, not only that the fact just stated should have existed at the date of the deed, but that the plaintiff should have extended his close into the interference, and that at the time of the extension or afterwards, before the date of the deed, there should have been no possession

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of the interference under the elder patent. Whether there was or was not such possession under the elder patent, depends upon facts and principles already considered and explained. In the instruction now under notice, the necessity of an entry by the plaintiff upon the interference and the question of possession under the elder patent, and the facts and principles involved in it seem to have been left out of view. And in giving and refusing other instructions which relate to them, the Court seems to have acted on views inconsistent with this opinion. These instructions were numerous and it is not necessary to state them in detail. We remark however, that it was not necessary in order to sustain the defence under the general issue, that the title should have been in Debovis, as one of the instructions assumes. If the plaintiff was not in possession when the entry complained of, was made, he cannot maintain the action. And if Debovis had not the legal title by the deed, his agent might have been in possession for him or for his grantor to the extent of its boundary.

No question as to the effect of the seven years limitation under the act of 1809, is made in the instructions, and none arises necessarily on the record. But for the errors above noticed, the judgment is reversed and the cause remanded for a new trial in conformity with this opinion. And we suggest that the case should be explicitly disposed of as to the defendant who was not served with process.

Lindsey and Curry for appellants; *Wall and J. Trimble* for appellee.

CHANCERY.

Wells' heirs vs Head.**Case 36.**

APPEAL FROM THE OLDHAM CIRCUIT.

Descents. Merges.

July 8.

JUDGE MARSHALL delivered the opinion of the Court.

The case
stated.

WILLIAM WELLS, the owner of a tract of unimproved land containing upwards of 700 acres, had it divided by survey in 1826, avowing that he intended it for his two sons Samuel and Francis, and Samuel being then just married, went upon the land intended for him under this avowal of his father, built a house and resided on the land until his death in 1833, having in the meantime cleared for cultivation some 40 or 50 acres, and erected convenient buildings. He left a widow, the daughter of James Head, and two infant children of the marriage, Mildred and William. The possession seems to have been continued for the benefit of the family of Samuel Wells, the land being at first controlled or rented out by his administrator. Afterwards his widow intermarried with one Sneed, who was appointed guardian of the children, and held the possession. In 1838, William Wells, the father of Samuel, died, leaving a widow, and after having at some antecedent period entered upon the land, and had 50 acres of it surveyed, which he said he intended to give to his son's widow for her dower. In 1839, commissioners were appointed to divide the real estate of William Wells, and they divided the tract into three parts, of which, one was allotted to Mildred and William Wells, infant children of Samuel Wells, deceased, one to Francis S. Wells, son of William, deceased, and one to Letitia Pemberton, his daughter, the persons just named being the only heirs of said William. A deed corresponding with this division, was made by the commissioners to Mildred and William Wells, and approved by the Court in May,

1839. William Wells, the son of Samuel, died in 1848, in infancy, and unmarried, having survived his sister Mildred, who died unmarried, and his mother, who had no child by her second marriage. But whether his mother or his sister died first, is uncertain. The land allotted and conveyed to the children of Samuel Wells, included their improvements, but not the whole of the land of which their father had taken possession.

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OF
HEAD.

In March, 1849, James Head, the maternal grandfather of William Wells, the son of Samuel, filed this bill against his maternal grand-mother, Elizabeth Wells, widow of William Wells, senior, and the descendants of Francis S. Wells and Letitia Pemberton, claiming that the land had descended to Mildred and William Wells, from their grand-father, and under the law of descents in this State, he was entitled to one moiety of the land of which William Wells, junior, had died seized, and that the paternal kindred above described, are entitled to the other moiety. The paternal grand-mother, Elizabeth Wells, concurs with the statement and claim of the bill. But the other defendants rely upon the gift of the land by William Wells, senior, to Samuel and the subsequent possession, and claims that the land descended to Samuel's children from their father, and not from their grandfather, and that under the 5th section of the act of descents of 1797, (*Statute Law*, 563,) the kindred on the side of the mother of the infant decedent are excluded from participation in the inheritance with the brothers and sisters of his father, or their descendants.

The first question to be determined is, whether the case comes within the fifth section above referred to, which is an exception from the general course of descent. And this question depends upon the question whether the title which William Wells, junior, had at his death descended to him from his father or from his grand-father. If from his grand-father, then the 5th section does not apply, and for want of mother, brothers, sisters, and their descendants, the estate descends

First question
for adjudication,
whether the title
descended from
the father or
grand-father.

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HEAD.

in equal moieties to the paternal and maternal kindred of William; the grand-father on either side, if there be one, being entitled to one entire moiety to the exclusion of all others, and if there be on either side no grand-father living, then the moiety to which he would have been entitled, passes to the grand-mother, uncles and aunts, and their descendants, on the same side, or such of them as there be. In which case, the grand-mother would take one-third of the moiety of this estate, the descendants of Francis S. Wells, would take one third *per stirpes*, and the descendants of Letitia Pemberton would take the remaining third in the same manner. But if the title which William Wells had, descended to him from his father and not from his grand-father, then the fifth section applies, and the question arises as to its effect. That section declares that "when an infant shall die without issue, having title to any real estate of inheritance, derived by purchase or descent from the father, the mother of such infant shall not succeed to, nor enjoy the same or any part thereof, (saving her right as dowress,) if there be living any brother or sister of such infant, or any brother or sister of the father, or any lineal descendant of either of them. In the case of *Clay, &c. vs Cousins*, (1 *Mon.* 75,) this Court seems to have considered the whole force of this section as confined to the exclusion of the mother, and to the case of there being a brother or sister of the infant or of the father, or any descendant of either. If this be so, then although there be a brother or sister of the infant or of his father or descendants of such brother or sister, the mother alone is excluded; and although if the mother be living the case would not happen in which the statute directs the estate to be divided into two moieties, one to go to the paternal and the other to the maternal kindred; yet if there be no mother at the death of the infant, the case for such division happens precisely according to the letter of the statute, and there is nothing upon which the prohibition of the fifth section can operate.

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 TO
 HEAD.

Whether this strict construction of the 5th section, (or as may be said of the 5th and 6th sections, for the 6th makes a similar provision where the title is derived from the mother,) should be carried out, and the exclusion be confined alone to the parent from whom the title was not derived, we need not for reasons presently appearing, decide in this case. We remark however; that although it may seem incongruous to exclude the mother, if living, and yet if she be dead, to admit her kindred to the same participation in the inheritance, as if she might herself have enjoyed it if living, yet such appears to be the letter of the section. And as the provisions of the 5th and 6th sections, taken from the Virginia act of 1790, are innovations upon the original act of 1785, and are exceptions from the general principle, and course of descent adopted from that act into the act of 1797, before referred to, a strict construction may not be unreasonable.

The act of 1785, regards only the kindred of the decedent, and totally discarding all reference to the blood of the first purchaser, or of the ancestor from whom the title descended, placed the paternal and maternal kindred on precisely the same footing. A reference to the cases in which these provisions of the act of 1790, incorporated into our act of 1797, came up for construction before the Courts of Virginia, will show the disfavor with which they regarded this partial return to the feudal principle of preference for the blood of the first purchaser. It may not be inconsistent with the general spirit and object of the statute to disregard wholly the line of ancestors through which the title has come, even to an infant decedent, except in cases coming literally within the letter of the 5th and 6th sections, and to the extent literally prescribed by them. Such was the principle and basis of construction in the case of *Clay, &c, vs Cousins*, above referred to, and in that of *Duncan vs Lafferty's adm'r.*, (6 J. J. Marsh., 47,) in which it was decided that the father of the infant decedent is excluded only when the estate comes to the in-

The provisions of the Virginia Statute of descents of 1785, regards only the kindred of the decedent, disregarding the blood of the first purchase, placing the paternal and maternal kindred on the same footing.

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VS
HEAS.**

Where infants die possessed of real estate of inheritance not derived from the father, where such infant leaves at his death no mother, nor brother, nor sister, nor their descendants, the maternal and paternal kindred are entitled to the estate in equal moieties.

The same is the case where it descends to the infant from the grand-father.

Where a son enters upon land of his father by his consent, looking to his father for title, the possession is not adverse.

fant from the mother herself, and not when it comes from her father, and of course not when it comes from her child.

Then from whatever source the title came to Mildred and William Wells, the infant children of Samuel, when Mildred died her interest of one half descended either to her brother alone, or to her mother and brother jointly and equally. And whether in one way or the other, the death of both sister and mother concentrated the entire title in William, and he must have derived one-half by descent either from his sister alone or from his sister and his mother, and not by descent from his father or his grand-father. As to one half of the land, therefore, his death under age and without issue did not make a case under the 5th section, but leaving at his death no mother, nor brother, nor sister, nor their descendants, his paternal and maternal kindred were on his death entitled to equal moieties of that half under the 7th section of the act of 1797, unless there might be to some extent an exclusion under the 6th section, which is not claimed.

With regard to the other half, we can come to no other conclusion than that the only estate of inheritance which William Wells had at his death, was by title derived not from his father, but from his grand-father; and that in fact his sister Mildred had no other title at her death. Samuel Wells had no other title in the land but a mere possession, which even, if it had been adverse to the title of his father, had not ripened into a title either at his own death or at the death of his father.

But his possession was not in fact adverse. It was taken and held by permission of his father, and in expectation of a gift from him. And whatever equities he may have acquired with respect to the improvements made by his labor, he held the possession in subordination to his father—looking to him for a gift of the title. He was in effect but a tenant at will, subject to the loss of his possession at least upon notice, and to a loss of

his expected title without notice. He had no estate of inheritance nor title to such estate during his life nor at his death. And although his possession was continued by, or on behalf of his representatives, its character was still the same, until upon the death of his father the title descended in parcenary to his children, together with the other heirs. If this title could have been rejected, there was never any indication either on the part of Samuel or of his children or of those who acted for them, that it would be, or that it was rejected. On the contrary, the division by the County Court, and the acquiescence in it without objection even now made, when it took from these children a part of the land which their father and themselves might have claimed under the gift, shows if acceptance were important, that the title of the grand-father was accepted for the infants, and must suffice at least to prove the character of the possession held for them, and which was their only interest in the land.

WELLS' HEIRS
TO
HEAD.

But the law cast upon them the title of their grand-father, and as it was perfect, being strengthened and not weakened by their possession, it was in fact and in law their only title.

If an only son holds a bond upon his father for the gratuitous conveyance of a specific tract of land, and the father dies, the title by the bond is merged in the legal title. Where an equitable estate becomes united with an exactly coinciding legal estate, the former is extinguished: (*Barton on real property*, 426, 3 *Vesey, jr.*, 329, *same* 120, 6 *Mad.* 118. And certainly an estate at will would merge in a fee simple title descending on the tenant. As Samuel Wells was either a tenant at will, or at most a *quasi* tenant with some equity to a conveyance, if this estate or interest descended to his children, it was merged in the title which was descended from their grand-father whose tenants or *quasi* tenants they were. And the descent from them and each of them must be of the title thus in them, and according to the course of descent of the legal title which never

If an only son enter upon land having his father's bond for title, and the father die, the equitable title merges in the legal: (*Benton on real property*. 426—3 *Vesey, jr.*, 329. *Ib.* 120. 6 *Mad.* 118.) So an estate at will of the son from the father under like circumstances.

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BEATTY.

was in their father, and never was in them except by descent from their grandfather. It was by this title alone that the land was held after the death of the grand-father, and an adverse title cannot now be set up on the previous facts, to prevent the regular descent of the land according to that title. It follows that the complainant Head, the maternal grand-father of William Wells, is entitled to one moiety of the land, which is all that he claims.

The decree being in conformity with this opinion, is therefore affirmed.

W. Morris, and M. Brown for appellants; *Harlan* for defendants.

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CHANCERY.

Willet vs Beatty.

Case 37.

ERROR TO THE LOUISVILLE CHANCERY COURT.

Lien. Dower.

June 24.

JUDGE HISE delivered the opinion of the Court.

Case stated.

THE complainant Samuel Hammon, trustee, &c., filed his bill against Martin Dusk to enforce his lien upon a house and lot in Louisville, to realize thereby, the residue of the unpaid purchase money. Dusk answers and amongst other matters in defence, (not necessary to be noticed,) he states that he is informed and believes that one Nancy Willett has a claim to dower in the property sought to be subjected, as the widow of David Ray, deceased—makes his answer a cross bill over against her and others, and calls upon her as defendant thereto, to answer, set up, and prove her claim.

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BEATTY.

Complainant answers Dusk's cross bill, and says that he does not know, and therefore denies that Nancy Willett is entitled to dower in said property as David Ray's widow, and calls for proof; that Dusk had previously purchased the same from one David L. Beatty, who conveyed to him by deed with covenant of warranty, and that when Dusk repurchased from him, he was apprised of the nature of the title. He makes this answer a cross bill against Beatty, and prays that if Nancy Willett should establish her claim to dower, that he should have relief over against him, (Beatty,) upon his warranty of title.

Nancy Willett having been brought into the case by Dusk's cross bill as above stated, answers and sets up the following facts: That the lot in question was by Levi Tyler, sold and conveyed by deed to one Patrick Ray, on the 14th of May, 1830, for the sum of 500 dollars, to be paid in 1, 2, 3, 4, and 5 years, 100 dollars each year, with interest—that a lien was reserved in the deed to secure the payment of the purchase money. That Patrick Ray entered into possession of the lot, made improvements and held it until his death.—That her husband, David Ray, as the only brother and sole heir of Patrick Ray, deceased, after his death entered upon and took possession of the property, and held the same until his death, in 1833; that she afterwards intermarried with Jonathan Willett, that 300 dollars of the purchase money had been paid by Patrick Ray in his lifetime, two notes for \$100 each, the balance due for the lot, was transferred, one to Daniel, the other to Joyes. That by suit in equity Daniel and Joyes enforced their lien upon the property, and on the 30th May, 1838, it was sold by virtue of a decree of the Louisville Chancery Court, through the instrumentality of its commissioner, and D. L. Beatty became the purchaser thereof, at the sum of \$317 73, and received the commissioner's deed, which was reported to, and confirmed by the Court on the 6th September, 1838. That the property as improved was worth three times

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as much as it sold for at said sale. That she was not made a party to said suit, and was married at the time to Willett, that her interests, just claim and right of dower, were wholly disregarded in said proceedings, the record of which duly attested are exhibited as part of her answer and cross bill. She prays that dower be assigned her, and for general relief.

Beatty's answer does not admit any thing, except his purchase of said property at the sum and time stated, and calls for proof, &c.

The substance of
the proof stated,

The proof in the cause sustains fully the facts as stated, indeed the pleadings in the chancery suit referred to, disclose the fact that David Ray was the only brother and heir at law of Patrick Ray, who it is averred, died without issue, and the bill of Daniel and answer of Tyler, state and admit that the title to the property had descended to Ann Ray, an infant, and only child and heir at law of David Ray, deceased, and the deposition of Edward Hughes, taken in the case referred to, proves that David Ray died after his brother Patrick, leaving a wife and two children, Ann and Mary Ray, and that the latter died without issue.

A widow whose husband is seized during coverture, cannot be divested of her dower by a suit to enforce a lien for balance of purchase money unpaid, brought after the death of the husband, to which she is no party, and a sale of the property

The complainant, Nancy Willett, was the mother of Ann, and the widow of David Ray, as is proven incontrovertibly by the depositions given in the suit. She was therefore entitled to dower in the house and lot in question, which right was subject however, to the lien reserved in the deed of Tyler to Patrick Ray to secure the payment of the purchase money.

Patrick Ray paid 300 dollars of the purchase money, built a house on the lot worth 500 dollars, and died. His brother David, at that time the husband of Nancy Willett, came into possession of the property, and held it until his death, as the only heir of Patrick Ray, deceased, leaving it still encumbered with a lien thereon, for the balance of unpaid purchase money and interest, amounting altogether, at the date of the commissioners sale to Beatty, to the sum of \$317 73.

If Nancy Willett had been made a party to the suit instituted in the Louisville Chancery Court, by which Daniel and Joyes as assignees were seeking to enforce their lien, and if her rights and interest had been then considered and litigated, in that case, if the *entire property* would have been necessary, at a fair sale, with such notice to her, by a commissioner acting under the decree of the Court, to satisfy the balance of the purchase money, and the whole estate had been necessarily sold for that purpose, she would have been thereby deprived of any right of dower whatever in the property. But she was no party to the suit, her right was not considered or provided for in any manner, in the decree rendered in that case. Her right and claim to dower therefore is not barred or precluded by the sale and purchase of the house and lot, resulting from the proceedings and decree had and rendered in that suit. Some of the witnesses have stated that the house and lot was worth \$1000 00 at the date of the commissioner's sale in May, 1838. The amount of purchase money then due was, as before stated, \$317 73. For securing the payment of this sum, a prior lien on the property existed, paramount to the widow's right of dower. If her interests had been represented and protected in the chancery suit referred to, it may be reasonably presumed that at a fair sale by the commissioner, the property, if unincumbered, would have been made to bring its fair cash value, from which value, assuming it at \$1000, deduct \$317 73 for unpaid purchase money, and the sum of \$682 27 would remain. If, therefore, the widow's dower had been assigned to her at the date of said sale, she might then have been entitled to one-third of the last named sum, to wit: \$227 42 1-3, during her life; or rather to an interest in the property of the value of the latter sum, her enjoyment of that interest to commence from the death of her husband. And as, without her consent, she has been deprived of her rights, and prevented from the enjoyment thereof, she is entitled to interest or rents proportioned to her claim in

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The Decree of
the Chancellor
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the property to be decreed against D. S. Beatty, who caused that deprivation and prevention by taking possession of the entire property, and enjoying the whole thereof, from and after his purchase at the commissioner's sale, as before stated. No doubt is entertained but that Nancy Willett with her two children, continued in the possession of the premises after the death of her husband David Ray, until she intermarried with Jonathan Willett, and from thence until the 30th of May, 1838, when the sale to Beatty by the chancery commissioner took place, and it is doubtless the fact also, and such is the opinion of the Court, that the property was sold and purchased with the idea and understanding, if not by express agreement, that the widow of D. Ray, then the wife of Willett, was entitled to, and would enjoy in future, a dower estate in the house and lot; and hence Beatty offered and gave no more nor less for them than the precise amount of the balance of purchase money and interest due at that time, to wit; \$317 73, a sum which as it appears, is greatly under its real value.

The final decree of the Louisville Chancery Court erroneously dismisses the cross bill of Nancy Willett, and directs the sale of the whole property to satisfy the unpaid purchase money due from Dusk to the original complainant Samuel Hammon, without regard to the claim of Nancy Willett.

It is the opinion of the Court that Beatty should be required to pay to Nancy Willett, her due proportion of the rents and profits of said house and lot, for each and every year intervening between the time when he took possession, and the period at which final decree shall be rendered in this case. A commissioner should be appointed to ascertain, by the proof taken, and other testimony, which he should be authorized to take, the annual average neat value of the rent of the house and lot, during the period above named, and the time when Beatty got possession, he should likewise ascertain the value of the house and lot itself in the state and condition it was on the 30th May, 1838, the date of Beatty's

A widow who is turned out of the possession of property by a sale thereof, under a decree to enforce a lien for a balance of the purchase money due thereon by the husband, in which suit she is no party: Held to be entitled to a third of the rents from the time she is turned out of possession.

How dower interest to be ascertained, &c.

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purchase, and also its present value, exclusive of any additions and improvements that may have been made, if any, since the last named period, and report such values and the proof taken, to the Court. Her fractional life estate interest in the property should then be determined by deducting the sum of \$317.73, from the ascertained value of the house and lot in May, 1838, and one third of the sum remaining, would be the value of her dower interest therein at that time. And her fractional interest in the premises being thus ascertained, then she would be entitled to a decree against Beatty for the same proportion of the annual value of the rents as ascertained, which the value of her dower interest bears to the value of the entire property, as fixed in May, 1838. And when her proportion of the annual rent is thus found, the amount should be multiplied by the number of years intervening between the period of Beatty's possession, and that of the final decree in this case, and the aggregate amount should be decreed to be paid to the widow by said Beatty.

In assigning to Nancy Willett her dower interest in this property, the Court should ascertain its present value exclusive of additions and improvements, if any made since the purchase by Beatty; and give to her the same proportionate fractional part thereof which she would have been entitled to at the date of the sale to Beatty, and such portion of the premises as shall be of the value of her interest as thus ascertained, shall be assigned to her for dower if practicable, and she so elects, or otherwise if necessary to her enjoyment of her interest, she may be allowed to have and receive during her life such proportion of the neat amount of the annual rents and profits of the said house and lot, as the value of her interest therein, bears to the total value of the same *entire*. And it may be so ordered that the present or any subsequent owner or occupant of the property shall hold and take the same, subject to her right and claim to her due proportion of the rents.

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As between the other parties to this suit, if the matters in controversy between them have not been adjusted, Dusk is entitled to relief over against his vendors, and they over against Beatty upon the covenants of warranty in their respective deeds of conveyance on account of the diminished value of the property, occasioned by the interest therein allowed to Nancy Willett for her dower.

Wherefore the decree of the Louisville Chancery Court is reversed, and the cause remanded with directions to that Court to render a decree in conformity with this opinion.

Spear for plaintiff; *Thruston & Pope* for defendants.

CHANCERY.

Streshley vs Powell.

Case 38.

ERROR TO THE LOUISVILLE CHANCERY COURT.

Contracts. Considerations. Chancery.

June 26.

JUDGE CRENSHAW delivered the opinion of the Court.

Case stated

To enjoin a judgment recovered by the appellant against the appellee in the Jefferson Circuit Court for the sum of \$700, besides interest and costs, the appellee filed his bill in the Louisville Chancery Court. An injunction was granted, and, upon trial, it was perpetuated.

The bill alleges an entire failure of the consideration of the note upon which the judgment was recovered. It appears that, on the 9th of January, 1850, the appellant sold to the appellee a negro boy for the sum of \$700, payable sixty days thereafter; that a note was executed for the price, and a bill of sale for the boy executed.

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POWELL.

The contract was made in Louisville, and in a different part of the city from that in which the boy was employed at the time. And the boy not being present, the proof shows that the appellee, before he executed the note, said to appellant, he would not sign the note, till he got possession of him; and that the appellee replied, "sign the note, and I will go and bring him immediately and deliver him to you;" whereupon the appellee remarked, "if you will go and bring him immediately, and deliver him into my possession, I will sign the note." Appellant promised to do so, and the note was signed, and the bill of sale executed. The appellant left immediately, but did not return with the boy. A little after dark, the same evening, the appellee sent a messenger to the residence of the appellant to know why he had not delivered the boy, and the appellant gave as a reason, that he, appellant, had been taken sick, but said that he would deliver him the next morning. The negro, however, was never delivered; and it turned out that, if he had not actually made his escape at the time the contract was made, he did so, shortly afterwards. From that day to the trial of the suit in the Court below, the boy had never been reclaimed, and the record does not show that he had ever been heard of.

The appellant offered a reward for the boy, still called him *his* boy, and when applied to for the note which had been given for the price, he said if he did not get and deliver him in a few days, he would surrender the note.

For an entire failure of consideration, defence might have been made to the action at law, but there is no doubt that Courts of Chancery have jurisdiction, not only where there has been a partial, but also where there has been an entire failure of consideration, as was decided by this Court in the case of *Case vs Fishback*, (10 B. Mon. 40.)

Courts of equity have jurisdiction to relieve against notes, not only where there is a partial, but where there is an entire failure of consideration: (10 B. Monroes, 40.)

The first enquiry is, has the consideration of the note failed? And we respond, we think it has. Had noth-

The consideration of a contract "is the materia

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cause of the contract, without which it will not be effectual or binding."—"The reason which moves a contracting party to enter into the contract." If it fail entirely, the Chancellor may relieve.

ing transpired between the parties at the time of the contract, but to sign and deliver the bill of sale on the part of the vendor, and the note on the part of the purchaser, it might, perhaps, be plausibly contended that the one constituted the consideration of the other; that there was nothing further to be done on either side, and that the contemplated delivery of the negro formed no part of the consideration of the note. But, when the note was about to be executed, said the appellee, "I will not sign the note, till I get possession of the boy;" said the appellant, "sign the note, and I will go and bring him immediately and deliver him to you;" said the appellee, "if you will go and bring him immediately, and deliver him into my possession, I will sign the note." Does not this demonstrate that it was not the *sale* simply, nor the execution of the *bill of sale* for the absent negro, nor both combined, that moved the appellee to sign the note? Was not the *motive* which induced him to do so, the contemplated immediate delivery of the negro? Certainly, no other conclusion can be drawn from the facts proved in the cause. And *Tamlins*, in his Law Dictionary, *page* 393, defines a consideration for a contract to be the "material cause of the contract, without which it will not be effectual or binding;" he says further, that, "as to contracts, a consideration may be defined to be the *reason* which *moves* a contracting party to enter into the contract." Did not the appellee in this case expect an immediate delivery into his possession of the negro boy, and did not this anticipated delivery *move* him to sign the note? Was not this anticipated *delivery* of the boy, the substance, the essence of the contract on his part? Surely it was. And this delivery not having been realized, there has been, in our opinion, a substantial failure of the consideration of said note.

From the facts as developed by the proof, we are inclined to the opinion that the negro had escaped, and was beyond the reach or control of the appellant at the time of the contract; and that it was then out of his

power to deliver him. If he had then actually fled, (and, if so, it was probably to a free State,) the thing for which the appellee contracted—the immediate delivery of the negro, was impracticable.

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vs
POWELL.

Can, or ought a Court of Chancery to withhold relief from the appellee, when it is apparent, that the sum of \$700 with interest and costs, is about to be coerced from him, when he has derived no more benefit from the contract than if the negro had been dead when the contract was made.

In the case above referred to, of *Case vs Fishback*, the facts were not so strong to show a failure of consideration, as those exhibited in the case under consideration; and there it appears to have been taken for granted that the consideration had failed, and the only question made, was as to the jurisdiction of a Court of Chancery.

But, no contract in truth was ever completed between the parties; it was in *feri* merely, and never consummated. The delivery of the negro, the essential part of the contract, not being made, the agreement itself failed, the contemplated contract was frustrated, and immediately, upon his finding that the negro was gone, the appellant should have returned and surrendered the note, and received his bill of sale.

We do not intend to be understood as expressing the opinion that no contract for personal property is good without delivery. The doctrine is well settled to the contrary; but we mean to express the opinion that, in this case, the delivery *being a part* of the contract, the contract was incomplete without it.

The contract being to deliver personal property upon a sale thereof, the consideration fails if there be no delivery.

A and B come to an agreement that A will give B \$100 for his horse, then supposed to be in his stable, fifty yards off, A to execute his note payable in three months, and B to deliver the horse immediately. A writes and signs a note for the \$100, and hands it to B, and B signs a bill of sale, and hands it to A, and starts off immediately for the horse—finds the stable door broken down and the horse stolen. Will any one con-

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tend that in such a case the contract has been completed, and that the note is obligatory? Certainly not. The agreement was still *in fieri* till the delivery of the horse, the parties were still engaged in the process of consummating the contract—they had not finally separated, and closed the agreement, but one has stepped off to get the horse and the other is in waiting to receive him. It is found that the horse has been stolen, that there can be no delivery, and the contract which was in process of consummation is at an end.

Let this case, therefore, be placed upon the ground that the contract had been completed, or, upon the ground that it was inchoate, and *in fieri* merely, and to our minds the appellee is equally entitled to relief.

In either view of the subject, we do not conceive that any principle of the law, as seems to be supposed by the counsel, in regard to parol evidence not being permitted to add to, vary, or contradict written instruments, has been violated. There is no doubt that parol evidence is permissible to show the consideration of an instrument which does not express a different one upon its face; and, when we allow a party, as in this case, to prove the transaction as it really occurred, we are allowing, as we believe, no variation or addition to be made to the note, but are allowing that only to be proved which is in harmony with the agreement, and not inconsistent with the note; the parol proof merely shows how, and under what circumstances the appellant got possession of the note. And these circumstances demonstrate that, if the contract be considered as having been completed, the substantial consideration of the note has failed, and the appellee is entitled to redress, if the contract be looked upon as inchoate and incomplete, he is equally entitled to relief.

Wherefore the decree is affirmed.

Fry and Pope for plaintiff; *Wilson and Logan* for defendant.

GRUGHLER
vs
WHEELER.

Grughler vs Wheeler.

ERROR TO THE PENDLETON CIRCUIT.

Forcible Entry and Detainer. Possession.

FORC. ENT.
AND DET.
Case 38.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

June 26.

Case stated

THIS was a writ of forcible entry and detainer sued out by Wheeler against Grughler. The trial in the country resulted in a verdict against the defendant in the writ, and he having traversed the finding of the jury, a trial was had in the Circuit Court in which the inquisition was sustained, and a judgment for restitution rendered. To reverse that judgment Grughler has prosecuted a writ of error.

The parties both claim the land under a certain Elkanah Said. The deed under which Wheeler derives his title from Said, is older than the deed under which Grughler and those he holds under, claim the land in contest. The land in dispute is covered by both deeds, and is uninclosed woodland. The testimony is that Wheeler had a tenant residing upon his tract of land outside of the interference, for several years, but claiming the possession of the whole tract, and that Wheeler, although he did not reside upon the land, had it in his possession, after the expiration of the lease to his tenant. Grughler took possession of his land outside of the interference during the time that Wheeler's land was in the possession of his tenant, and in the fall of 1849, after the latter had obtained the possession of his own land, the former entered upon the land in controversy, claiming the right to do so, and cut and carried away a considerable number of staves. For that entry, the writ of forcible entry and detainer was sued out.

It is evident from these facts, that Wheeler had the possession of the land in contest. Having the elder le-

If one having
the elder legal
title, enter upon

GRUGHLER
vs
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land with the intent to take possession to the boundary of his deed, he is in possession to that extent: though one be in possession outside of the interference.

gal title, his entry outside of the interference, made for the purpose of taking possession of the whole tract, vested in him the possession to the extent of his boundary, even if those claiming the other tract were in possession of it, outside of the interference. But it does not certainly appear that any person was in possession of any part of the last named tract at the time Wheeler entered by his tenant, and acquired the possession of his land, and as that possession has been continued ever since, it is clear that he had the possession when Grughler entered and cut and carried away the staves, in the fall of the year 1849.

But the main question is, was the act complained of, such an entry as authorized Wheeler to sue out a writ of forcible entry and detainer? As Wheeler was in the actual possession, that possession was not divested by the act of Grughler in entering upon the land and cutting and taking away some of the timber. He did not remain upon the land, enclose any part of it, or construct an erection of any kind, or do any act that deprived Wheeler of his possession. The entry, although wrongful, was only a trespass. It was not such an entry as the statute regulating proceedings in cases of forcible entry or detainer contemplates. The object of the statute, is to prevent, the deprivation by force of an actual possession, and to provide a speedy remedy for the redress of the injury when it occurs. This is evident from the nature of the judgment it prescribes, which is, if the inquest be in favor of the plaintiff, that he have restitution of the premises.

Every unlawful entry upon the possession of another person, will not authorize, because it may not require for its redress, a resort to the remedy provided by the statute. It is only where an entry has the effect of divesting a previous possession, and a restitution becomes necessary for the redress of the injury, that a writ of forcible entry or detainer can be maintained. The testimony therefore did not authorize a verdict in this case, that the inquisition was true.

An entry upon land for the purpose of cutting and removing timber, is not such a forcible entry as will authorize the proceeding by suit of forcible entry and detainer. It is only a trespass, and there is no divestiture of possession.

It is only where an entry has the effect of divesting a previous possession, that the writ of forcible entry and detainer lies.

Wherefore the judgment is reversed and cause remanded for a new trial, and further proceedings consistent with this opinion. As Wheeler was in possession of the land, in contest, it will not be proper to order him to restore the possession to Grugher, although a writ of restitution may have issued upon the judgment which is reversed, and been executed.

B. Monroe for plaintiff; *Swope* for defendant.

HOPKINS
vs
WARD, &c.

Hopkins vs Ward, &c.

ERROR TO THE NICHOLAS CIRCUIT.

Practices in Chancery. Mortgages. Parties.

JUDGE HISE delivered the opinion of the Court.

In this case, the Court below, by an interlocutory order, entered at the May term, 1849, directs Hopkins by the next term, to pay *the amounts* due the complainants Dougherty, Smedley, and Morgan, without ascertaining the amounts to be paid; and afterwards in July, 1850, a decree is rendered, which after reciting that defendant Hopkins had failed to pay the money as directed by the former decree, directs absolutely, a sale of so much of the mortgaged property as will satisfy and pay Dougherty and Smedley the sum of \$2850 10, with interest from the date of the decree—that the commissioner shall sell the property in the order required by law in sales under execution, and that the said commissioner shall also ascertain and report the amount due Morgan on the debts secured by the mortgage. These decrees are wholly erroneous:

1st. The preliminary order does not state what amount shall be paid by Hopkins to the defendants in

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CHANCERY.

Case 40.

June 30.

Case stated.

In decreeing upon a mortgage, the chancellor

HOPKINS

WARD, & C.

should ascertain the amount due to the complainant, and state it, and a decree ~~is~~ be made giving day for payment before any decree of foreclosure and sale. It should not be left to a commissioner to ascertain the sum due.

error, or to either, or which of them the payments should be made. The final decree directs the sale of mortgaged property without specifying or giving identity by date or description, to any particular deed of mortgage, although there are two deeds of mortgage from Hopkins to Morgan, Smedley, and Dougherty, copied in this record, not as exhibits made by either of the mortgagees in their answers and cross bills, but which were filed in the suit as exhibits made in the bill of the original complainant, Ward's administrator. It directs the application of the proceeds of the sale of mortgaged property to the payment of a sum stated, when no previous order had been made, giving day to Hopkins to pay any ascertained amount or amounts, severally, to either Dougherty, Smedley, or Morgan, and in fact it postpones the settlement of accounts as between Morgan and Hopkins, and refers the same to a commissioner, who is directed to ascertain and report the amount *due* from Hopkins to Morgan.

The amount decreed to Dougherty and Smedley, is \$2850 10, when there is nothing presented in the whole record from beginning to end, in the pleadings, exhibits, or proof, from which it can be learned what amount Hopkins is indebted to Dougherty and Smedley, or whether he is, or is not, indebted to them in any sum whatever.

A decree upon a mortgage should so identify the mortgage or property to be sold, as to show what is intended to be sold—and where there are joint mortgagees, if the fund is insufficient to pay all the mortgage debt a *pro rata* distribution of the fund should be decreed.

And where there are joint mortgagees, all are necessary parties to a suit for foreclosure.

It directs the sale of as much of the mortgaged property, without specifying the property or describing the mortgage, as may be necessary (and it may take the whole,) to pay Smedley and Dougherty the sum stated, without ascertaining the amount, if any, due to Morgan, who as a joint mortgagee, would be entitled to a *pro rata* share of the proceeds of the sale, and without having made John G. Parker a party to the suit, who is also in one of the mortgages from Hopkins, a joint mortgagee with Dougherty, Smedley, and Morgan, and of course a necessary party whose interests should be presented and settled, if any he has. On account of the objections stated, and because the pleadings of these

parties, which are very confused, and otherwise defective, furnish no sufficient data upon which to found the present decrees, and because there is no proof taken, commissioner's report made, or exhibits regularly filed, for want of which it would seem to be difficult if not impossible to make a proper disposition of the cause.

Wherefore the said interlocutory order and subsequent decree are reversed, and the cause remanded with directions that the parties have leave to amend the existing, and file additional pleadings, to file their exhibits and take proof, and for such other proceedings as may lead to a correct and final adjustment of all the matters in controversy, in default of which that the answers and cross bills of the defendants in error, be dismissed without prejudice.

Harlan for plaintiff.

GREENING
vs
Fox, &c.

Greening vs Fox, &c.

ERROR TO THE MADISON CIRCUIT.

Trusts & Trustees. Interest.

CHANCERY.

Case 41.

July 5.

JUDGE HISE delivered the opinion of the Court.

THIS is a suit instituted by S. Greening and wife against J. R., and C. S. Fox, and J. H. Berry and wife, in which they set up a written contract in which the said Fox's jointly undertake to use as prudently as possible, for the benefit of Berry and wife, and Greening and wife, a fund placed in their hands, at the date of their joint undertaking in cash notes and cash, amounting to the aggregate sum of \$1518 00. It seems that this fund belonged to Thos. Fox, the father of Green-

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ing's and Berry's wife's, and the same was placed with his assent in the hands of J. R., and C. S. Fox, to be used and controled by them, as provided in the said contract, subject to the payment of the debts of Thos. Fox then existing, and to his decent support and maintenance, and also subject or liable to be otherwise disposed of, (as this Court construes the instrument,) generally at the discretion of said Thos. Fox. This contract is dated the 21st of Jan'y, 1834. This fund was all available as admitted. This undertaking of the Foxes is *joint*, and they are jointly bound as trustees of this fund by the terms of the trust contract, to pay over to Berry and wife and Greening's wife, within six months after the death of Thos. Fox, the amount of said fund then remaining, and the interest that might be made thereon.

Thos. Fox died on the 25th of December, 1848, and the trustees having failed to pay over to Greening's wife within the six months as required, such portion of said trust fund as was due to her. This suit was brought by Greening and wife in August, 1849, to compel the said Foxes to a settlement and distribution of the amount remaining in their hands.

It appears that the said trustees at the date of said contract divided the fund between themselves in such manner as that the cash notes amounting to \$932 00, was received by J. R. Fox, and the cash amounting to \$586 00, was received by C. S. Fox.

The decree of the Circuit Court is erroneous in several particulars as well as the commissioner's report, the exceptions to which, should have been sustained.

In ascertaining the amount which should be finally decreed against the trustees, they should each be charged with the precise sum which each received on the 21st of Jan. 1834, the date of the contract and interest, at the rate of 6 per cent per annum for a period of two years, should be then added to the principle, and a rest then taken; at which period all the payments or disbursements which had been made in pursuance of the

A fund was placed in the hands of two individuals as trustees, who undertook jointly and severally to use the same precedently and profitably, to pay the debts of the grantor and support him,

trust, with interest added thereon, from the time when such payments were made, up to the period of the rests first fixed, and so on, making biennial rests at which interest shall be added to principal, and prior disbursements with interest added thereon, to the period of each rest respectively, be deducted, up to the time when the final decree shall be rendered. In this manner the amount due from Charles S. Fox, should be ascertained. In ascertaining however, the amount due from Isham R. Fox, he should be charged with the sum received by him at the date of said contract, in available cash notes, to-wit: \$932 00; and interest should be added to principle at the end of every two years, and prior disbursements properly paid out with interest from the dates thereof, to the respective biennial rests added thereon, should be deducted, and this mode of calculation in his case, should be continued up to the 18th of February, 1840, when it appears he paid to Berry \$1000 00 of the trust fund, which sum should then be deducted, and upon the balance then remaining of said fund in the hands of I. R. Fox, if any, current interest should be given and added up to the time when the decree is rendered; and when the sums due from each of said trustees are ascertained, they should be added together, and a decree rendered against them jointly, for the aggregate amount, and for the costs of suit.

Then in order to ascertain what proportion of the remaining fund shall be paid to Berry's wife, and what to Greening's wife, the advancements made to each of them by either of said trustees, or by Thos. Fox, dec'd., at any time subsequent to the 21st of January, 1834, should be ascertained as far as practicable, and each should be charged with such advancements and legal interest thereon, from the time they were made, until final decree rendered. Of course Berry and wife must be charged with the \$1000, advanced to them on the 18th February, 1840, and current legal interest thereon. And after the advancements of each are ascertained, Berry should be allowed the sum of five hundred dol-

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and divide the remainder in six months after his death between his two children: Held that the trustees (who divided the fund when received, should each be charged with the amount received and with interest on the fund at rests of two years, when disbursements with interest from the time of payment should be credited, and a joint decree rendered against both for the entire sum due.

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lars, and no more, for boarding Thos. Fox, dec'd., which as appears from all the proof on the subject, is ample compensation, all things considered; this sum should be deducted from the aggregate amount of advancements and interest thereon, made to Berry and wife, when the decree is rendered. Berry's wife, and Greening's wife, should then be made equal, out of the fund decreed against the trustees, if sufficient for that purpose, if not, that equality should be produced by requiring the one who has received the most, to pay one moiety of the excess to the others. If the fund decreed against the trustees, should be more than sufficient in amount to equalize the advancements to Berry and wife, and Greening and wife, the balance remaining should then be equally divided between the two wives, and be directed to be paid into the hands of solvent and competent trustees for their separate use and benefit.

Trustees who undertake to use precedently and profitably a fund put into their hands allowed as compensation for trouble and responsibility, 5 per cent is reasonable.

The trustees should be allowed a commission of five per cent. upon the nett amount severally disbursed by them, and upon the sum finally decreed against them; for which they shall have a credit, after deducting which, the balance then remaining will be the amount left for distribution, as herein directed.

The preliminary order, commissioner's report, and final decree in the Court below, being inconsistent with the principles and views above presented, are erroneous—therefore in the opinion of this Court, the exceptions to the commissioner's report should have been sustained, as also the exceptions to the depositions of the trustees, the two Foxes, who are jointly liable to complainant, and who have a direct interest in the result of this suit to reduce or extinguish their own liabilities, they were not competent witnesses to prove disbursements for themselves, or for each other, and their depositions to that extent, should have been rejected.

Wherefore the commissioner's report is set aside, and the interlocutory and final decree of the Circuit Court are reversed, and the cause remanded with directions

that further proceedings be had, and a final decree rendered in conformity with this opinion.

Turner for plaintiff; *Caperton and Burnham* for defendants.

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vs
HAMILTON.

Berry vs Hamilton.

MOTION.

ERROR TO THE BATH COUNTY COURT.

Case 42.

Executors. County Courts.

JUDGE CRENSHAW delivered the opinion of the Court.

July 7.

Case stated.

JOHN BERRY, executor of the last will and testament of Eliza Ann Hamilton, moved the County Court of Bath county, to permit him to give bond and security, and be qualified as such executor. The Court overruled his motion, and he has brought the case to this Court.

Many witnesses were introduced, and a large volume of evidence was given upon the trial of this motion—all, in regard to the moral character, and the moral fitness of said Berry to be executor of said will. Much of this testimony involved particular transactions of Berry in a fiduciary and individual capacity, but we deem it altogether unnecessary to enter into an investigation of it, or to mention any impression which it has made upon our minds, either *pro* or *con*. It is sufficient for us to say, that the law has declared who may, and who may not be executor, and if Berry be a man whom the law allows to be appointed as such, it follows that, upon his motion to give bond and security, and to qualify under the will, it was the duty of the County Court, if the security was sufficient, to permit him to give bond and be qualified as executor, and to grant him letters testamentary.

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If the opinions of men in regard to the moral characters of those who may be appointed executors, and in whom testators repose confidence, whatever those opinions may be, are to be received, and are to constitute the evidence by which, in law, we are to ascertain who may, and who may not be, appointed executors, we apprehend that but few appointments would fail to be contested by some of the relatives of testators, who are often too easy to be dissatisfied, or, by persons who themselves, desire to be administrators for personal aggrandizement, or, who would rejoice in so fit an opportunity to gratify some private hatred. Such enquiries would involve questions of very difficult and doubtful decision—such as, how good a man must be to qualify him for executor, and how bad he must be to disqualify him—how could any certain rule of determination be established. Enquiries of such a nature would be the most vague and uncertain in their results, of any ever instituted in a court of justice; and would, in our opinion, be absurd in the extreme.

Besides, to allow an inquisition of the sort would be to deny to men a privilege which for centuries has been held to be most sacred and dear—that of freely disposing of their own property to whom they please, and of appointing trustees of their own choice to manage and control it when they are no more. Whatever may be the opinions of men as to the propriety, or impropriety of a particular appointment, the very basis and foundation of the exercise of the right which society has granted to its members to appoint their own representatives after death, is the special confidence reposed by the testator in the appointee. And men, it seems to us, would care but little for the high privilege of disposing of their estates to their own liking, if they are to be denied the right of selecting those who are to carry out and effectuate the benevolent purposes of their wills.

It is true, some persons are incapable of being executors—the law has pointed out who they are, and society has long been satisfied with the wisdom of the rules upon this subject.

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In *Williams on Executors*, 1st vol. 118, it is said, "there are few or none, who, by our law, are disabled on account of their crimes, from being executors: and, therefore, it has always been held that persons attainted or outlawed may sue as executors because they sue *in auter droit*, and for the benefit of the parties deceased." The same author says, page 121, that "idiots and lunatics are incapable of being executors or administrators; for these disabilities render them not only incapable of executing the trust reposed in them, but also by their insanity and want of understanding, they are incapable of determining whether they will take upon them the trust or not." Whether an alien enemy can be an executor appears not to be fully settled.

The author whom we are quoting, on page 112, lays down the doctrine that, "generally speaking, all persons who are capable of making wills, and some others besides, are capable of being made executors." And says, that, "from the earliest time it has been a rule, that every person may be an executor, saving such as are expressly forbidden." It is said, moreover, by this same author, on page 119, "that the spiritual Court cannot refuse to grant the probate of a will to a person appointed executor on account of his poverty or insolvency."

All persons who are capable of making wills may be executors, and some others; (*Williams on Ex'ors*, 112,) poverty or insolvency is no objection: (*Ibid*, 119.)

The doctrine of the law as thus laid down by Williams, will be found to comport with the other standard authors upon the same subject; and it is found that Berry comes not within any rule of law which prohibits him from being an executor.

An executor derives his office from a testamentary appointment. And, if he be a man, not prohibited by law from being an executor, the County Courts have no right to refuse his qualification.

The case of *Day vs the Commonwealth*, to which we have been referred as throwing some light upon this subject, is not, in our opinion, analogous in principle to the question under consideration. That is a case in which the County Court of Fleming refused to qualify

An executor derives his authority from the will, and if he be one who is recognized by law as competent, the County Courts in Ky., have no right to refuse their qualification, on account of any supposed defect of moral character.

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a deputy who was proposed by the sheriff, because the Court believed him unworthy. This Court remark substantially, in that case, that, though the sheriff has the power to appoint his own deputies, yet the *public* are interested in the faithful execution of the trust—that this power to appoint his deputies was not reposed in the sheriff for *his individual* benefit, but for the public good, and, therefore, the County Court must be admitted to possess *some discretion* in guarding the public against an abuse of this power. The difference in principle between that case and this, will be readily perceived without any comment from us.

Wherefore, the judgment of the County Court is reversed, and the case remanded with instructions to permit the appellant to give bond with sufficient security, as required by law, and to be qualified as executor of the last will and testament of Eliza Ann Hamilton, should he make application to the Court to do so, and to grant him letters testamentary.

Robinson & Johnson for plaintiff; *Apperson, Hamilton, and French* for defendants.

FORC. ENT.
 AND DET.

Case 43.

June 24.

Roberts' heirs vs Long.

APPEAL FROM THE SHELBY CIRCUIT.

Forcible entries, &c. Possession. County Lines.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

THIS was a writ of forcible entry and detainer sued out by the appellants against the appellee, who obtained a verdict and judgment in his favor in the Court below.

Case stated

ROBERTS' E'X'X.
vs
LONG.

The appellants assert claim to a tract of 800 acres of land, part of which lies in the county of Franklin, and the residue in the county of Shelby. They and their ancestor, under whom they claim, had been in the actual possession of that part of the land which is in Franklin county, for many years, claiming the whole eight hundred acres, and using the land in Shelby county as their own, cutting and making sale of the timber growing upon it, and treating it in every respect as part of the land upon which they resided. They had not however, enclosed any part of the land in Shelby county, prior to the entry thereon by the appellee; their improvements and enclosures being all confined to the county of Franklin. The ancestor of the appellants had taken possession of the land in his lifetime, and when he entered upon it in Franklin county, the possession of the whole tract was vacant, and remained so, until the entry by the appellee upon the land in Shelby, for which, shortly after it was made, the writ of forcible entry and detainer in this case was sued out.

The only question is, had the appellants possession of the land in Shelby county at the time the appellee entered upon it?

The doctrine is well settled, that one who enters on land intending to take possession of the entire tract, no part of which is held adversely at the time of the entry, is in possession to the extent of his claim. As the entry by the ancestor of the appellants was manifestly made with an intention to take possession of the whole tract, no part of which was then held adversely, he thereby acquired the possession to the extent of his claim, unless the legal effect of his entry, was limited to the land in the county upon which it was made.

In the case of *Hord vs Walker, &c.*, (5 Litt. 22,) it was decided, that an entry upon land in one county, part of which extended into another county, did not stop the running of the statute of limitations in favor of the person who was in the adverse possession of the

An entry upon any part of a tract of land, with the intent to take possession of the whole survey or boundary, gives possession to the extent of the survey or boundary not held adversely by another—but is limited to the lines of the county in which the entry is made.

The case of *Hord vs Walker*, (5 Litt. 22) cited and approved

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land in the other county, when the entry was made.—
 The person who made the entry had the paramount legal title, but the land in the other county was at the time the entry was made, held adversely. The principle settled was, that if a tract of land lies part in one county, and part in another, and the part in the latter is held adversely, an entry in the former by the owner of the paramount legal title, although made with an intention to take possession of the whole, and within the interference of the two claims, yet being made upon the land in one county only, does not invest the person who makes the entry with the possession of the land held adversely in the other county.

Sowder & Myers
 vs *McMillan's*
heirs, (4 *Dana*,
 456,) cited and
 approved.

In the case of *Sowder and Myers vs McMillan's heirs*, (4 *Dana*, 456,) it appeared that the land extended into two counties, and the lessors of the plaintiff claimed that they had acquired the possession of the whole tract, by an entry made by them through an agent upon the land in one county, the possession of the whole land in both counties being then vacant, and that the subsequent entry by the defendants upon the land in the other county was made upon the land in their possession. But the Court decided that the entry of the lessors of the plaintiff upon the land in one county, did not invest them with the possession of the land in the other county.

Where a tract of
 land lies in two
 counties, there
 must be an entry
 in each to give a
 possession.

Both of these cases recognize the principle of law, that to acquire the possession where the land lies in different counties, there must be an entry in each county. The only point of difference between them is, that one applied the principle to the case of an adverse, and the other to the case of a vacant possession. This rule of law as applicable to both the cases mentioned, is sustained not only by the authorities referred to in the opinions, but also by the case in 1 *Leon*. 265, cited in 2 *vol. Cruise's digest*, side page, 367, where a manor extended into two counties, and the eldest son, upon the death of his father having entered into the demesnes in one county only, it was held that he had not

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thereby acquired the possession of the land in the other county: (see also 1 vol. *Cruise's digest*, side page 64.) Although therefore, the law upon the subject has been denounced in the argument of this case as unreasonable, it seems to be fully sustained by authority; and we have not been able to find, nor have we been referred to even a single modern decision in which it has been either disregarded or overruled. By the entry, upon the land in Franklin county, therefore, the possession of the land in Shelby county, was not acquired. It remains then, only to determine whether the acts proved to have been done in Shelby county, invested the appellants with the possession of the land in that county.

These acts according to the doctrine settled in the cases of *Brazdale vs Speed*, (1 Mar. 106,) *Smith vs Mitchell*, (1 Mar. 208,) and other subsequent cases, would not, where a person entered and took possession under a junior patent, outside of the boundary of an elder patent, invest him with the possession of that part of the land claimed by him, that was inside of the elder patent. But the main reason for restricting the possession in such a case to the line of the elder patent, does not exist where a county line is the only obstacle to the extension of the possession. The acts done inside of the line of the elder patent would be illegal and tortuous, having been done without right, but if done on the land in the adjoining county, by a person having the right of entry upon the whole tract, who had made an actual entry into part of the land in the other county, they would be legal, and might authorize the inference that they were done with an intention to extend the possession, and if done for that purpose, would in law have that effect.

An entry upon land in one county and the occasional use of timber from the same survey, extending into another county, will not give such a possession as will authorize the maintaining a writ of forcible entry & detainer.

If such a distinction does exist, and it were proper to recognize and establish it, which we do not at present decide, it could not have any application or effect in this case. The land in controversy is covered by a patent that issued to John Campbell. The appellants did not show any right to enter upon it. The acts were

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unauthorized and illegal, and not constituting in themselves an actual possession, will not by operation of law have the effect of extending the actual possession of the appellants. Campbell's patent extends into the county of Franklin, and includes part of the land in the possession of the appellants. But although the appellants had possession of the land in Franklin county inside of the interference, yet that possession would not even if continued twenty years toll the patentees right of entry, to the land in Shelby. Nor did it give to the appellants the right to enter upon the land in contest, and therefore its occasional use did not vest them with the possession of it.

Wherefore the judgment is affirmed.

Cates and B. Monroe for appellants. *M. Brown* for defendant.

FORCIBLE
DETAINER.

Hudgen vs Temple.

ERROR TO THE ANDERSON CIRCUIT.

Case 44.

Forcible Entry and Detainer. Possession.

JUDGE HISE delivered the opinion of the Court.

July 8.

Case stated

IN September, 1850, the plaintiff, William Hudgen, sued out a warrant of forcible entry and detainer against Isaac Temple, which was served, and a trial had on the premises. The jury found the defendant not guilty.—The plaintiff traversed the inquisition, and in the trial in the Circuit Court of Anderson county, the inquisition was sustained by the jury, and there was verdict and judgment for the defendant.

The plaintiff has brought the case into this Court. The record presents the following state of case: The

plaintiff having recovered in the Anderson Circuit Court a judgment in ejectment by default, against one John Riley, for a boundary of land on Salt river, containing about 2500 acres—was through his authorized agent, placed in possession of the whole tract, by the sheriff of the county, in virtue of a writ of *Habere facias*, issued on said judgment on the 24th September, 1849. The sheriff so delivered the possession of this land to the plaintiff, through his agent, G. B. Taylor, by expelling from a cabin thereon, one William Southern and Elizabeth Wood, by whom it was then occupied, and placing said Taylor in possession of the cabin, and of the whole tract, on the 2d of October, 1849. At which period, and for two or three years previous, there was, and had been no other person in the actual possession of the land, except Southern and Wood, who were turned out by the sheriff, and John Riley, the defendant in the action of ejectment, who upon notice being served upon him, abandoned the possession of the said cabin and went off the land. On the same day, to-wit: on the 2d of October, 1849, the plaintiff by his said agent, Taylor, leased the land to Southern and Mrs. Wood, and they returned immediately into the cabin, as the tenants of the plaintiff, upon a contract to pay three dollars rent, not to cut themselves or suffer others to cut timber on the 2500 acres of land, and binding themselves to deliver the whole 2500 acres of land, to the plaintiff, or his agent, by the 25th of December, 1849. Whilst these persons were thus as tenants of the plaintiff, in possession of the land, Temple, the defendant, on the 15th of October, 1849, moved into another house about half mile distant from the cabin, and took up his residence therein, under the claim of Jordan, his father-in-law, who had set up a claim to 500 acres of land by metes and bounds, including the house into which Temple had entered, and which house, and perhaps the whole or a greater part of Jordan's claim was embraced within the boundary of land the possession of which, had been delivered by the sheriff

to the plaintiff's agent. Temple continued to reside in this house, and the said Southern and Wood in the said cabin, as the tenants of the plaintiff, until April, 1850, when they abandoned the possession, and a few days afterwards it was consumed by fire. Temple has continued in possession of the House which he had entered in October, 1849. And this proceeding was instituted against him by the plaintiff, for a forcible entry and detainer. It is in proof, that Riley, the defendant in the action of ejectment, entered under Patrick Jordan, who claimed 200 acres of land on which said cabin was situated, and which was wholly covered by the plaintiff's claim, and when Riley abandoned the possession, and Wm. Southern and Elizabeth Wood entered, it is to be presumed that their possession extended no farther than the boundary of Pat. Jordan's 200 acre claim, which did not conflict with the 500 acre claim of his father, on which Temple entered. It is proven, that in August, 1849, Temple commenced repairing and improving the house to make it habitable, and moved in after it was prepared. If, therefore, it is considered that entering the premises and being engaged in working upon the house and repairing the same, with the intention when completed, of moving in with his family, gave Temple a legal entry and actual possession in fact of the house and the 500 acre tract of land claimed by his father-in-law, in such case, that proceeding could not be maintained against him by the plaintiff, because the possession of this claim had not been delivered to him or his agent, at the period of Temple's entry, in August, 1849, and he, the plaintiff, had no possession at that time, either actual or constructive, of the whole or any part of his boundary of land, the possession of which, had not been delivered to his agent by the sheriff, until the 2d of October, 1849. And if Temple is to be regarded as having entry and possession in August, 1849, then inasmuch as he entered upon the 500 acre tract claimed by his father-in-law, and under him he could not be deemed guilty of a forcible entry even up-

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on the possession of Southern and Mrs. Wood, who then occupied the cabin and premises which had been abandoned by Riley, under and within the 200 acre claim of Pat. Jordan, adjoining to, but not conflicting with the 500 acre claim of his father. If, however, it is determined from the proof that Temple entered and took possession of the house and land claimed by his father-in-law, at any time between the 2d of October, 1849, and the month of April, 1850, it must then be deemed a forcible entry upon the possession, in fact of Southern and Mrs. Wood, who were then actually occupying the whole claim of plaintiff as his tenants, under contract to pay rent, to prevent waste, and to redeliver possession on the 25th of December, 1849.

If Temple entered after the 2d of October, and before the 25th of December, 1849, it was upon the possession in fact, of the tenants of the plaintiff, whose term had not expired, and who alone could maintain this proceeding for such forcible entry. So, likewise, if Temple entered after the expiration of the term of the said tenants, but whilst they still continued upon the plaintiff's land, and before they delivered back the possession to the plaintiff, it would still be but a forcible entry upon them or upon their actual possession, and they alone, and not the plaintiff, in such case, could maintain this proceeding for a forcible entry. Although the tenants by holding over their term, are guilty of a forcible *detainer* of the possession from their landlord, and might by this proceeding, at his instance, be compelled to restore the possession to him, yet a forcible entry in the meantime, upon the premises in the actual possession of the tenants, though after the expiration of their term, is a forcible entry upon them and not upon the landlord, who has not yet regained the possession in fact from his tenants.

But in this case, it is believed from the proof, that Temple entered after the commencement, and before the expiration of the term of the plaintiff's tenants, and as he was guilty of a forcible entry upon the pos-

The landlord whose tenant is entered upon, cannot maintain the writ of forcible entry and detainer. It is only the person who is actually possessed and entered upon, that can maintain the writ.

Forcible entry and detainer can not be maintained by the landlord whose tenant has been entered upon, even

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though the term of the tenant has expired, and he has left the premises before the warrant brought.

session in fact of the tenants of the plaintiff, and not upon his possession; although the warrant in this case, was not issued until after the tenants term had expired, and they had themselves abandoned their possession. Yet the landlord, the present plaintiff, cannot maintain this proceeding, and must fail—because, 1st, Temple never was guilty of a forcible entry upon the possession in fact of the plaintiff, nor is he guilty of a forcible detainer of a possession of land acquired from the plaintiff, and held or detained contrary to any engagement with him. The law has been thus settled by this Court heretofore, in the case of *Yoder's heirs vs Easley*, (2 Dana, 246,) and it has been frequently decided in other cases that this summary remedy for forcible entries was allowed by the statute to that person only, who at the date of the entry had the possession in fact of the premises entered upon.

Therefore, the Circuit Court did not err in giving the instructions asked by the defendant, or in qualifying that asked by the plaintiff, and the judgment is affirmed.

Harlan for plaintiff; *Kavanaugh* for defendant.

CHANCERY.

Cosby's heirs vs Wickliffe, &c.

Case 45.

APPEAL FROM THE WASHINGTON CIRCUIT.

Mistakes. Considerations. Heirs.

July 2.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

Case stated and decree of the Circuit Court.

NATHANIEL WICKLIFFE, and B. Abell, two of the creditors of Dabney C. Cosby, dec'd., instituted separate suits in chancery against his heirs, to subject to the payment of their demands, some estate which they con-

tended had belonged to him in his lifetime, and was liable for the payment of his debts. To sustain the jurisdiction of a Court of Chancery, it was alleged that no person had administered upon his estate, and that his children and heirs at law, were non-residents. B. Abell administered on the estate during the pendency of the suits, and having been made a party to the suit in the name of Wickliffe, he filed an answer and cross bill in that suit, asserting a right to have his debt paid out of the fund that Wickliffe was attempting to subject to the payment of the debt which was due to him. The two suits were consolidated and heard together, and a decree rendered by which both the demands were satisfied. From that decree the heirs have appealed.

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It appears that Cosby in his lifetime had mortgaged his interest in his father's estate, being an undivided interest in remainder after the death of his mother, to a man by the name of Harlan, who had afterwards by a suit in chancery obtained a decree for the sale of the interest, for the payment of the mortgage debt, and that the commissioner who was appointed to make the sale, reported that he had sold the entire interest to Susannah Cosby, the mother of Dabney C. Cosby, whose report was confirmed, and a conveyance executed by a commissioner, in conformity with the report conveying the entire interest to the purchaser, who afterwards conveyed the same to the children of her son, Dabney C. Cosby, he having departed this life. These facts having been developed during the pendency of the suits, and the object of Wickliffe's suit having been to subject this interest to the payment of his demand; he filed an amended bill in which he alleged that the commissioner under the aforesaid decree, had in reality sold only two-thirds of the interest, and that he had either by mistake, or by fraud and collusion with the purchaser, reported to the Court that he had made a sale of the whole interest, instead of a sale of two-thirds, and in consequence thereof, the entire interest had been conveyed to the purchaser, and had passed to the chil-

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dren and heirs of Dabney C. Cosby, by the conveyance made to them, one third of which, was liable to the payment of his demands. The heirs denied the alleged fraud or mistake, and insisted that the entire interest had been sold by the commissioner, and purchased by Susannah Cosby.

The chancellor has jurisdiction to relieve against mistakes. A commissioner appointed by a decree of the chancellor to sell, sold two-thirds of the estate, but reported to the Court that he had sold the entire estate, and in obedience to the order of the Court, conveyed the whole—but it appeared clearly, by his certificate of sale, given to the purchaser at the sale, & by other evidence, that two-thirds only, was in fact sold:—Held that the mistake should be corrected.

The mistake in the report is fully and clearly established by the testimony. The certificate subscribed by the commissioner on the day of the sale, and given to the purchaser, states that she had purchased two-thirds of the interest only. Another bidder proves that he had made a bid proposing to pay the amount for which the decree authorized the commissioner to sell, for less than the whole interest, and that he was under bid by the purchaser. The purchase was not made by Susannah Cosby in person, but by her agent, who also testifies that he purchased for her, only two-thirds of the interest. The recollection of some of the witnesses is, including the commissioner who made the sale, but whose recollection about the matter seems to be very indistinct, that the entire interest was sold. And as their recollection is supported by the commissioners report, the matter would be involved in some doubt and uncertainty, were it not for the certificate of sale executed by the commissioner on the day on which the sale was made. That certificate was found among the papers of the purchaser after her death by her executor, and when considered in connection with the other testimony upon the subject, leaves no room for any rational doubt, that the commissioner who did not make his report of the sale until four months had elapsed, then reported by mistake or inadvertance contrary to the actual fact that he had sold the entire interest.

The mistake was the act of the commissioner, and not of the Court, and although the title passed to the purchaser by the conveyance made by order of the Court, and was subsequently conveyed to the children of D. C. Cosby, yet as the conveyance to them was without any valuable consideration, they hold one third

of it, as their grantor had also held it, in trust for their father's creditors. The question as to the mistake was expressly made in the pleadings, and it has been litigated by the only parties interested in its decision. It is the peculiar province of a Court of Chancery, to afford relief to the parties prejudiced by a mistake, and in doing it in this case, no principle of law or equity is violated. On the contrary, as the purchaser by the mistake of the commissioner, acquired property that she had not purchased or paid for, it would be unjust to permit it to be held by her or her voluntary donees, against the claim of creditors.

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B. Abell alleged in his bill, that assets had descended from Dabney C. Cosby to his children and heirs at law. That since the death of their ancestor, they had as his heirs at law, brought an action of ejectment against a certain William McDonald, for a tract of land which had thus descended to them, and had compromised the suit, and conveyed or agreed to convey their title to McDonald, who had paid them for the land a considerable sum of money, which money was liable in their hands as assets for the payment of their father's debts. The heirs answered and admitted that such an action had been brought by them and compromised, an agreement having been made between them and McDonald, by which the latter agreed to pay each of them, there being three, the sum of one hundred and fifty dollars, and they were to convey to him whatever title they had to the land. They further stated, that the land had been sold as the property of their father by the sheriff by virtue of an execution in his hands, and that McDonald bought it from the purchaser, and held the possession under that purchase; that having understood there was some defect or irregularity in the sale, the action of ejectment was brought by them to recover the land, but having become doubtful of success the suit was compromised. They contended that McDonald's title to the land was valid, that no title to it had descended to them from their father, and that the

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only inducement that McDonald had to agree to pay to them the amount stipulated, was to purchase his peace, and relieve himself from an expensive and troublesome litigation, and the money was not, therefore, liable in their hands, to the payment of their father's debts. The deposition of McDonald contains the only testimony upon the subject. He proved that he had compromised the action of ejectment with the heirs, and paid them four hundred and fifty dollars, and received from them a conveyance of their title to the land. He also proved that he regarded his title as good, and was informed by his legal advisers that he could defeat a recovery by the heirs, and had made the compromise with them alone for the purpose of purchasing his peace, and terminating an expensive law suit, but he also stated explicitly, that he would not have paid them the money without an agreement on their part for the conveyance of their title. He did not prove the nature of his title or of the claim of the heirs, nor does either appear from any thing contained in the record.

Where heirs at law brought a suit to enforce a claim to land, and receive money by way of compromise, the heirs are liable to the creditors of the father.

As the action of ejectment was brought and the recovery sought by them as heirs of their father, who had owned the land in his lifetime, and no other right to it was claimed by them, the proceeds of the suit resulting from the compromise must be considered at least *prima facie*, as the avails of a right which had descended to them from their ancestor. The suit was founded on that right alone, and in the absence of all testimony as to the exact character of their claim, it must be regarded as having been of sufficient importance to authorize the institution of the suit, and to produce the compromise. Whether, if it had appeared clearly and conclusively, that the title of McDonald was good and valid, and no right or title had descended to the heirs from their father, the money obtained by them by way of compromise, should be treated as assets in their hands, it is unnecessary to decide. For as the case stands, that question is not presented; and when a

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claim has been asserted by heirs to property which had belonged to their ancestor, and a compromise made, the avails of the compromise, deducting the expenses incurred in the litigation, must be regarded as resulting from the title which had descended from the ancestor, and consequently as assets in their hands, at least, until they make it manifest that no right or title had descended. The claim, whether real or pretended, was derived from the ancestor, and it was alone in consequence of his having been the previous owner of the land, that his heirs were enabled to maintain the suit. If, as stated in the answer, the attempt to recover the land from McDonald, was based upon the supposed invalidity of the sheriff's sale, in consequence of his having sold the land for a sum exceeding the amount of the execution, that was an effort which they could make alone in the character of heirs, and had they succeeded in the suit, and recovered the land, it would have been assets in their hands; and they have not made it appear that such a recovery could not have been had, if the suit had been prosecuted to its final issue. It seems to us, therefore, that the compromise money was properly regarded by the Circuit Court as assets in their hands, and as the amount they were decreed to pay, still left remaining in their hands a sum sufficient to pay the whole expense of the action of ejectment, there was no error in that part of the decree.

The consolidation of the two suits was proper, and the order made for that purpose did not prejudice the appellants.

Wherefore the decree is affirmed.

Rountree & Fogle, and Shuck for appellants; *Harlan* for defendants.

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Fisher vs Dinwiddie, &c.

Case 46.

APPEAL FROM THE LOUISVILLE CHANCERY COURT.

Deeds of Trust. Fraudulent Conveyances.

July 9.

JUDGE HISE delivered the opinion of the Court.

The case
stated.

ON the 15th day of March, 1849, Dinwiddie executed and delivered a deed of trust to McBride and Maxey, trustees, conveying to them a house and lot, subject to two prior mortgages, and assigning to them a debt due from McDavid, for \$1600, in trust, that the proceeds arising from the sale of the property and the amount due from McDavid when collected, should constitute a fund to be applied, so far as it would go, to the payment of all his debts, giving no preference to any one creditor or class of creditors. The note on McDavid for the said sum of \$1600, was given in consideration of the purchase by him from Dinwiddie of four slaves, which had been a short time before the date of the deed of trust, taken from Louisville to Warren county, and sold to McDavid. The complainants, as judgment creditors, brought this suit in chancery against Dinwiddie, McDavid, the said trustees, and all the creditors named in the deed of trust, and against other parties, charging that the deed to the trustees and the sale of the slaves to McDavid, were pretended and fraudulent, and made to cheat, hinder, and delay Dinwiddie's creditors. The defendants interested, all answer and deny the charge of fraud, and demand that the trust deed should be enforced, and the trust fund applied *pro rata* to the payment of their various claims, including the demands of complainants themselves, which were also provided for in said deed.

The Circuit Court directed that the amount of the several demands of the creditors should be ascertained, including complainants, by its commissioner. That the

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debt due from McDavid should be paid, and that part of the fund to be distributed *pro rata*, and that the trust estate should be sold on failure of Dinwiddie to pay the creditors by a day given. And finally a decree was rendered directing the sale of the trust property, and the distribution of the fund arising therefrom, first, to those creditors who held prior liens by mortgage, and afterwards to the other creditors, including complainants, *pro rata*, and adjudging the sale of the slaves to McDavid, and the deed of trust to McBride and Maxey, to have been fair and not fraudulent.

This Court after a careful examination of the pleadings and proof in the case, concur with the Court below in opinion as to the fairness and validity of those transactions. The issues of fraud or no fraud, as presented in the pleadings, between complainants and Baxter, and complainants and Hughes, in respect to the sales and conveyances of city property, made by Dinwiddie to them in fraud of his creditors, as charged, seems not to have been noticed, determined, or in any way disposed of, by either of the preliminary orders or the final decree rendered in the case, in reference to the deed of trust. Though the causes are by a provision in the decree, retained for any further orders that may be necessary. There is no error perceived in the interlocutory order, or in the final decree as rendered, with respect to the trust fund and its distribution, and it is not for this Court now to intimate even, an opinion as to the final disposition which should be made of the collateral issues still pending and undetermined in the case.

Wherefore the decree is affirmed.

Guthrie for appellants; *Fry & Page, Bridges*, for appellees.

A deed of trust made for the benefit of all the creditors of the grantor without giving preference to any creditor or class of creditors—he held not to be fraudulent.

CHANCERY.

Watkinson vs Watkinson.

Case 47.

ERROR TO THE LOUISVILLE CHANCERY COURT.

Divorce.

July 10.

JUDGE HISE delivered the opinion of the Court.

Case stated.

THE complainant asks for a divorce from the defendant upon the ground alone, of abandonment, avoiding with commendable delicacy, a resort to charges against his wife of any improper or criminal conduct, until she, urged apparently, by a mischievous and revengeful spirit, in her answer and cross bill, regardless of feeling or character, charges the complainant with meanness, cruelty, and degrading and improper conduct, resists his application for a divorce, and demands one herself. The complainant then, in answer to defendant's cross bill, exasperated, no doubt, by the charges of dishonorable conduct contained therein, indulges in a spirit of recrimination, and attempts to make it appear that defendant first made his life miserable by her light, frivolous, and indelicate conduct, and then abandoned him without any sufficient cause.

The husband is entitled to a divorce from the wife who in the society of others treats her husband with absolute contempt, & shows a preference for the company of another man against the remonstrances of the husband, and then abandoned the husband for a year.

The Court below, granted the defendant a divorce upon her cross bill, and dismissed the bill of complainant, erroneously, in the opinion of this Court. From the testimony in the cause, it is manifest that discord and discontent, poisoned the peace, and disturbed the union of these parties—and that in this, as in most other cases of the sort, the conduct of both was imprudent, hasty, and improper. But this Court is satisfied, that the defendant, when her own light and imprudent behavior is considered, had no adequate cause for her voluntary abandonment of the complainant. The proof shows that she made it a rule in the society of others, to treat her husband not only with coldness, but with absolute contempt; and that she persisted, contrary to his re-

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quest, and when she saw how galling and painful it was to his feelings, to receive the attentions and seek and enjoy the society of one Seymour, and thus show a marked preference for him over her own husband.—The complainant, by an amount and character of proof which commands belief and conviction, has shown himself to be an honest, upright man, of sober, business habits, of a steady temper, and of amiable disposition; others, the friends of the defendant, it is true, say he had a jealous and irritable nature, but the contrary of this is proven by such a number of disinterested and intelligent witnesses, that it is presumed the opinions of the former are perhaps colored by partiality and prejudice; and upon the whole case, the opinion is formed, that complainant was more entitled to relief than the defendant. The abandonment for one year without sufficient cause, is established by the proof, in the opinion of this Court, and the matters that were improperly disclosed in the complainant's answer to defendant's cross bill, which seems to have caused the lower Court to refuse relief to him, were drawn from him when stung and irritated by the charges heaped upon him by defendant.

Wherefore the decree of the Court below, dismissing the complainant's bill, is reversed, and the cause is remanded with directions that a decree be rendered divorcing the complainant from the defendant, entirely dissolving the marriage contract between them, and restoring the complainant to all the privileges of a single or unmarried man.

Porter & Smith, and Wilson & Logan, for plaintiffs;
Bullitt for defendant.

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MOTION.

**Commonwealth vs Milton.
City of Lexington vs Same.**

Case 48.

ERROR TO THE FAYETTE CIRCUIT COURT.

Citizens. Corporations. Constitutional Law.

July 10.

JUDGE MARSHALL delivered the opinion of the Court.

The statute of 1842-3, (Sess. acts, page 88,) concerning insurance companies chartered by other States, effecting insurances in Kentucky.

WM. E. MILTON, having as agent of the "Columbus Fire and Marine Insurance Company," incorporated by the State of Ohio, and without authority from this State, effected in the city of Lexington, Kentucky, various insurances against loss by fire and other casualties, and received therefor, a large sum as premiums of insurance, the present proceeding was instituted in the Fayette Circuit Court, for the purpose of having, upon a case agreed between the representatives of the Commonwealth and of the city of Lexington, respectively, on the one side, and the said Milton on the other, a judicial determination as to the constitutional validity of the tax imposed by an act of 11th of March, 1843, upon insurance companies not incorporated by the State of Kentucky, and of the tax imposed by ordinance of the city of Lexington, under the authority of the Legislature.

The sixth section of the act of 1843, (*Session acts, 1842-3, page 88,*) entitled, an act to add to the resources of the Sinking Fund, enacts "that no person or persons within this Commonwealth, shall act as agent or agents for any individual or association of individuals, not authorized by the laws of this Commonwealth, to effect insurances against losses by sea or on rivers, in the nature of marine insurances; or insurances on lives, or granting annuities, or against any other loss or peril, whether by rain, flood, fire, or other casualty, by land or water, upon all or any species of property although such individuals or associations may be incor-

porated for that purpose by any other State, without a license first had and obtained for that purpose," which the Clerks of the several County Courts are authorized to issue, on payment to them of the sum of one hundred dollars.

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The 7th section of the same act enacts that any person or persons acting as agent or agents for any individuals or association of individuals not authorized by the laws of this Commonwealth, to effect insurances against losses, risks, or perils, of whatsoever nature, &c.; although such individuals may be incorporated for that purpose by any other State, shall pay to the agent of the Auditor of Public Accounts, semi-annually, the sum of two dollars and fifty cents, upon every sum of one hundred dollars, upon the amount of all premiums received by such agent or agents, or any other person or persons for them, or which shall have been agreed to be paid for any insurances effected or agreed to be effected, or procured by him or them, as such agent or agents, against loss or injury sustained, &c. And the said agent or agents are required to furnish twice a year, to the agent of the auditor, a complete list, under oath, of all such premiums, and also of all such insurances, and pay the said sum of two dollars and fifty cents in every hundred dollars. And any agent or agents who shall offend against the act shall forfeit and pay to the Commonwealth, the sum of \$1000, to be recovered, &c., provided, that notwithstanding such forfeiture and payment thereof, such agent or agents shall remain personally responsible for the payment of said premiums, &c. And the principals of such agents, their property, goods and chattels, shall be liable to the payment of all such judgments, fines and decrees, and may be proceeded against by action, bill, &c. &c.

By an act of February, 9th, 1844, (*Sess. acts*, 1843-4, page 24,) the sixth section of the act of 1843, above recited, was repealed; and the license required by the said sixth section was thus dispensed with, but without affecting the seventh section, and the tax or per centage

The statute of 1844, (*Session acts* of 1843-4, page 24,) repealing the 6th section of the act of 1842-3, and the ordinance of the

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upon premiums as thereby imposed. But by an act of February, 1847, (*Sess. acts, 1846-7, page 265,*) the Mayor and Council of the city of Lexington, are authorized to require that all insurance companies, and agents of insurance companies doing business as such, within the limits of the city, shall take out license, also to prescribe the terms and require the annual renewal of the license, and to demand and receive for each license, a sum not exceeding one hundred dollars. The statute then prohibits any insurance company or agent of an insurance company, whether chartered by the State of Kentucky or not, from making insurance, &c., without such annual license. And imposes a penalty of \$300, for the benefit of the city and to be recovered in the Lexington City Court, upon any insurance company, or officer, or agent of one, who shall violate any of these provisions.

Under this act, the Mayor and Council of Lexington, passed an ordinance, the first section of which, requires the agent of every insurance company then or thereafter established in that city, to take out a license to insure, to be issued and signed by the Clerk, and countersigned by the Mayor of the city, and it recites that the Lexington Insurance Company had contributed towards the Fire department, in the years 1845-6, the sum of \$240. The 2d section requires the agent of every insurance company upon obtaining license, to execute a bond, &c., in the penalty of \$200, conditioned to render on oath, semi-annually to the Mayor, an accurate account of premiums received during the preceding six months, and to pay to the city $3\frac{1}{2}$ per cent. on the amount of said premiums. The 3d section imposes upon every agent of an insurance company within the city, (the Lexington Insurance Company excepted,) who shall proceed to insure any thing whatsoever, without taking out a license in conformity with the ordinance, a penalty of ten dollars, to be paid to the city, for every twenty-four hours neglect to take out the license. And the 4th section provides, that should the

aforesaid per centage on premiums amount to more than one hundred dollars within twelve months, no more than \$100 shall be received by the city.

It is stated in the agreed case, that all the members or corporators of the Columbus Fire and Marine Insurance Company, are non-residents of Kentucky, and that said company is not authorized to insure by any statute of Kentucky. It is also stated that the Lexington Insurance Company, in addition to the amount stated in the ordinance, had continued voluntarily to subscribe to the Lexington Fire Companies, one hundred dollars for each year. And it was agreed that should the statutes and ordinance above recited, be deemed valid, judgment should be rendered in favor of the Commonwealth and of the city, for the amount of the tax and license without the penalty.

The Circuit Court decided that the act of 1843, and the ordinance of the city of Lexington above referred to, were both and each unconstitutional and void, as to "the Columbus Fire and Marine Insurance Company," and the defendant Milton, its agent. And rendered a judgment for costs against the Commonwealth and the city, each of which prosecutes a writ of error.

The precise grounds or views on which this judgment was founded, do not appear in the record. But it is now contended, that the act of 1843, is in conflict with that clause of the Constitution of the United States, (*1st clause, 2d section, 4th article,*) which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," and that it is also in violation of that equality and uniformity of taxation which is required by the Constitution of Kentucky. The ordinance is also alleged to be in violation of the Constitution of Kentucky, and of the statute authorizing the city to require a license tax from insurance companies, inasmuch as it exempts from the requisition and from the tax on the license, the Lexington Insurance Company. We shall consider these objections in the order in which they are above stated.

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1st. The repeal of the 6th section of the act of 1843, which was not adverted to in the argument, and was not recollected by the Court until after the section was copied in this opinion, does not change essentially either the character of the act or the questions arising under it. The power asserted in each of the sections, is that of regulating the business of insurance, by subjecting it when done by agents of individuals or associations not authorized by the laws of this State, to the burthen of taxation, either in the form of a tax for license to do the business, or in the form of a tax proportioned to the amount or value of the business done. Or, it is the power of taxing for revenue, the business of insurance within this State, unless done by individuals or associations in proper person, in their natural capacities, and upon their personal responsibility, or by individuals or associations authorized by law. The reference in the act to individuals or associations authorized by the laws of this State, was undoubtedly intended to denote corporations created by this State for the purpose of insuring or authorized to insure. Upon these corporations, though effecting insurances by their agents, as they must do if they effect them at all, no burthen or restriction is imposed by the act, any more than upon individuals or associations making insurances in their natural capacity and in person. The discrimination between such corporations and individuals or associations not incorporated or authorized by the laws of this State to effect insurances, consists in the restriction or burthen imposed upon the right or facility of the latter, and not upon the former, to make this contract through the instrumentality of agents.

Whether the Legislature of Kentucky has a right thus to discriminate between corporations created by it and the individual citizens of the State, is a question arising under the Constitution of Kentucky, and not under that of the United States, certainly not under that clause which secures to the citizens of each State, all immunities and privileges of citizens in the several

States. And as the act of 1843, makes no discrimination whatever, between the citizens of this, and those of other States, when acting in person in their natural capacities, but subjects all and each to the same burthens when effecting insurances through the instrumentality of agents, and as, moreover, neither this nor any other statute precludes the individual citizens of other States from becoming members of the exempted corporations, but they are as free to become so at their own option as the citizens of this State are, (and it is to be presumed that citizens of this State may become members of foreign corporations,) the exemption of the domestic corporations of this State is not a discrimination between the individual citizens of this and of other States, but is only a discrimination between these domestic corporations and the individual citizens of all the States, and between domestic and foreign corporations without regard to the citizenship of their members. If, therefore, the word "citizens," in the clause of the Constitution which has been quoted, refers to citizens in their natural persons, there seems to be no plausible ground for alleging a violation of this clause by the act of 1843. But as the corporations of other States can only act in this State by means of agents, and are therefore necessarily subject to the burthens imposed by this act for making contracts of insurance by agents, while domestic corporations authorized to insure, are not subjected to the burthen, though acting by agents, there is a substantial discrimination between domestic and other corporations, to the disadvantage of the latter. And it is said that as the business of insurance in this State is done by corporations, and not by individuals, the tax upon individuals insuring by agents, or upon agents effecting insurances for individuals or associations, is but a device to cover the real object of imposing a tax upon foreign corporations for doing within the State the business of insurance, which domestic corporations may do without being taxed, and that in making this discrimination, the act of 1843, denies to citizens of other

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States some of the privileges or immunities of citizens of this State, which the Federal Constitution intended to secure.

If this assumption with regard to the real object of the act of 1843, were conceded, which we are not prepared to do, still in order to sustain the conclusion contended for, it must be shown either that a corporation as a mere legal existence distinct from the individuals composing it, is a citizen of the State which creates it entitled to the benefit of this clause of the constitution, and to the privileges and immunities of citizens in every State; or that in denying to the corporations of other States the right of doing within this State in their corporate capacity, what similar corporations of this State are allowed to do, or imposing upon such right, if allowed, a burthen or tax not imposed upon domestic corporations, some privilege or immunity of the citizens of other States, and which they have under this clause of the constitution, a right to enjoy on equal terms with the citizens of this State, is withheld from them or improperly burthened.

Citizens of other States exercising corporate privileges granted by such state, may be taxed in Kentucky.

In reflecting upon the important principles involved in these propositions, a comprehensive answer to each of them suggests itself in the consideration, that it was not intended by this clause of the Federal Constitution, to give to the laws of any one State, the slightest force in another State. The clause secures to the citizens of each State in every other State, not the laws or the peculiar privileges which they may be entitled to in their own State, but such protection and benefit of the laws of any and every other State, as are common to the citizens thereof, in virtue of their being citizens. And as the citizen of one State does not by virtue of this clause carry with him into any other State, or become entitled to exercise there any peculiar privileges which he may have enjoyed at home, as being allowed or conferred by the laws of his own State, neither does he acquire by force of this clause, any peculiar privileges in another State, except upon the condition on which they

may be held or enjoyed by the citizens of such other State. But the corporation itself and its faculties or privileges as such, and the right of individuals to be or compose a corporation and to act in a corporate capacity, are all peculiar privileges, creations of the local law, and cannot by the mere force of that law, exist or be exercised beyond its territorial jurisdiction, it must therefore require the permission express or implied, of the sovereign in whose territory the corporation attempts to operate, unless the right be secured by the superior power of the Constitution.

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The Constitution certainly intended to secure to every citizen of every State the right of traversing at will the territory of any and every other State, subject only to the laws applicable to its own citizens, of exercising there, freely but innocently, all of his faculties, of acquiring, holding, and alienating property as citizens might do, and of enjoying all other privileges and immunities common to the citizens of any State in which he might be present, or in which without being present he might transact business. But in securing these rights it does not exempt him from any condition which the law of the State imposes upon its own citizens, nor confer upon him any privilege which the law gives to particular persons for special purposes or upon prescribed conditions, nor secure to him the same privileges to which by the laws of his own State he may have been entitled.

In *Corfield vs Coryell*, (4 Wash. Cir. Court Rep'ts., 380,) Judge Washington characterizes the privileges and immunities secured by this clause as being such as are, "in their nature, fundamental, which belong of right, to the citizens of all free governments and which have at all times been enjoyed by the several States which compose this union, from the time of their becoming free, independent, and sovereign." We suppose the same idea is conveyed when we say that they are such privileges and immunities, as are common to the citizens of any State under its constitution and constitutional laws. But neither in this comprehensive description of the

The rights secured by the Constitution of the U. S., to citizens of the several States, relates to those fundamental rights which belongs to the citizens of all free governments under their own constitutions.

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privileges and immunities guarantied by this clause of the constitution, nor in the enumeration which follows, is there any reference to corporations or corporate rights, or to any peculiar privileges, or to the right of a corporation to make contracts, or acquire property, or do any corporate act beyond the limits of the State, which creates it. And as these cannot be regarded as fundamental or common rights or privileges, they seem to be wholly excluded, except so far as the rights of citizens may be involved in the acquired rights of corporations of which they may be members.

If any State, supposing it to be within its own option, should allow a corporation of another State to transact business as a corporation within its limits and to acquire property there, the rights and property thus legally acquired, being held by the corporation for the corporators, may be entitled to the same protection under this clause of the constitution, as if held by the corporators themselves. And as the value of the corporate rights legally acquired either in the State to which the corporation belongs, or in any other, may depend upon the right of suing, to be exercised according to the established forms of proceeding in the corporate name, it may be that the right of suing in the corporate name, which among independent nations would be matter of comity, may, by liberal interpretation be regarded as one of the privileges and immunities of citizens, to which the corporators citizens of any of the States, are entitled in every State. But if this be so, it is not as we think, because a corporation must be, or may be regarded as itself, in view of this clause of the Constitution a citizen of the State which creates it, and is entitled therefore, to all privileges and immunities of citizens in every State; but because the corporators themselves, being citizens, and the privilege of asserting their rights in the Courts being fundamental, they do not lose the benefit of the guarantee, because in point of form the suit for their benefit must be in the corporate name. The legality of the act done and of the right claimed by

the corporation being established, a remedy for its assertion is due to justice, and is allowed as we suppose by all civilized nations. If among these States the right to it is made absolute by the constitution, the mere form of the remedy is of little consequence. And if the sovereignty of the States is somewhat impaired by depriving them of the right of refusing the remedy to corporations intrusted with the interests of citizens, this is done for the advancement of justice, the establishment of which is one of the declared objects of the constitution. And in the perfect reciprocity secured by the guarantee to the citizens of every State, in its tendency to establish justice, to ensure domestic tranquility, to promote the general welfare, and to form and preserve a perfect union of the States, and the people intended to be united in one government, the slight restriction thus imposed upon the exercise of sovereignty by the States, is fully compensated.

But the most absolute recognition or guarantee to the citizens of each State of all privileges and immunities of citizens in the several States, if limited as its terms import, to individual citizens as natural persons, and if restricted, as all must allow it to be, to such privileges and immunities as are fundamental, and therefore presumably common to the citizens of every State in their natural capacities, implies no concession by or in one State, to the laws of any other State, and imparts no extra territorial vigor to the laws of any State. It is rather a concession to the natural faculties and rights of individuals to the law of nature from which they are derived, and to the principles of benevolence and equality, the prevalence of which marks the advance of civilization and refinement. It is a concession too, which, while in point of congruity, it is due to all individuals who are citizens of the same government, is in no respect inconsistent with the character and objects of the instrument by which that government is created, or with the principles on which the government and the union are based.

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If, however, the clause is to be construed as guaranteeing to the citizens of each State, not merely the privileges and immunities common to the citizens of any other State in which they may claim to act as citizens, but such privileges and immunities as the laws of their own State allow or confer upon them, it would at once be perceived that its character of beneficence and conservative liability is changed by the introduction of a principle, which so far as the rights of individuals are concerned, gives full effect in each State to the laws of any and every other State, and thus secures to each State the power of extra territorial legislation in and over the other States, to the extent that power can be made operative by conferring rights or privileges upon its own citizens, to be exercised by them in other States. But objectionable as such a power would be if confined to conferring rights upon individual citizens, it is fraught with still greater evil if under the idea that a corporation is itself a citizen, it may exercise in every other State such rights and privileges as are conferred upon it by the State of its locality, and which it may there exercise. As corporations concentrating capital and skill are more powerful than the individuals who compose them, and as corporations may be used for almost every purpose connected with the business and interests of society, the absolute right of the corporations of one State to do in every other State, all corporate acts within the powers granted by its charter, is in effect an absolute and almost unlimited power in one or in each State to legislate extra territorially, by conferring rights within another State or by conferring upon instruments of its own creation the power of acquiring them there. The apparent reciprocity of the power would prove to be a delusion. The competition for extra territorial advantages would but aggrandize the stronger, to the disparagement of the weaker States. Resistance and retaliation would lead to conflict and confusion, and the weaker States must either submit to have their policy controlled, their business monopolized

and their domestic institutions reduced to insignificance, or the peace and harmony of the States would be broken up, and perhaps the Union itself destroyed.

Without looking to any extreme consequences, we say that the grant of extra territorial power to the States, is wholly beyond the objects of the constitution and inconsistent with its character and provisions. For the general purposes of the constitution and the Union, certain powers of legislation and of sovereignty are transferred from the States to the Union, for the preservation of harmony, and for the protection and effectuation of individual rights, the exercise of other powers not transferred is restricted or prohibited. For the same purposes, and to ensure and facilitate the attainment of justice, full faith and credit are secured to the public acts and records of each State, and full effect given by the authorized legislation of Congress to its judicial proceedings. In the same spirit, fugitives from justice and from labor, are to be restored. But we do not in these, or in any other provisions, find any grant or recognition of a power of extra territorial legislation in the States. And as we believe the exercise of such a power would be destructive of the ends of the constitution, and tend to the subversion of the Union, we cannot adopt any forced construction or subtle refinement for the purpose of deducing from the clause now in question, the existence of such a power. We believe the constitution grants no power to the States except through the general government in which they all participate. It was no part of its object to grant extra territorial power. None existed in the States before the constitution, and none exists independently of it. We think none is granted by the clause now in question, because it is not granted in terms, and can only be deduced if at all, by artificial construction, and because if established by such construction it would be inconsistent with the character and destructive of the objects of the instrument.

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It was not the purpose of the Federal Constitution to give to the States the right of making laws or centering privileges to corporations, which shall have force without the States where made.

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The proposition contended for does not however, go to the length of claiming an absolute right for the corporations of one State to exercise their corporate faculties in another State, but claims the right of exercising such functions or doing such business in another State, as the corporations of that State are allowed to do, and on the same terms. But this proposition is but a mitigated form of the other and contains the same principle, only more limited in its application. It allows a State to keep out foreign corporations upon condition that it shall create none for itself. But should the State consider it necessary for any of its own purposes, to create a domestic corporation framed and guarded for the accomplishment of its own objects and according to its own views of the public safety and advantage, it can only create this necessary instrument of its own, on the condition of losing the power of repelling or restraining the interference of foreign corporations, and on condition of admitting similar instruments of other governments to operate freely within its own territory, in the same manner and to the same extent as is allowed to its own. If such were the written words of the constitution, it might be said that a State by the act of creating a corporation, consents that similar corporations created by other States should come freely into competition with it, since it knows that such would be the legal and necessary consequence. But the act in its own nature implies no such consent, but rather the contrary, since it is an act by which the State attempts to regulate its own affairs and to subserve its own interests by its own laws. And if the constitution compels it, as the consequence of such an act, to submit to the interference of foreign corporations framed and controlled by foreign laws, it so far subjects it to the legislation of other States, and gives to each State a power within every other State which shall attempt to advance its own internal prosperity by means of domestic corporations. Even under the limitation stated, the proposition amounts to this, that whatever one State may

authorize its corporations to do within its own limits, other States may authorize their corporations to do within the same limits, or what is the same thing, their corporations deriving their existence and powers solely from them, may do without and against the will of the State within which they choose to operate. There is no grant or guarantee of any similar right or power in the constitution. No such concession is implied in the guarantee to individual citizens of each State, of all fundamental or common privileges and immunities of citizens in the several States; because the corporate existence and functions are themselves peculiar privileges not fundamental or common to the citizens of any State, but only to be acquired on the conditions prescribed in the charter of incorporation, not belonging to a citizen of the same State merely because he is a citizen, and therefore not belonging to the citizen of another State either on the ground that he is such citizen, or that he has become a member of a corporation of the other State by complying there, with the conditions of membership. It is not, therefore, through the privileges and immunities guaranteed to individual citizens, that the foreign corporations of which they are members can acquire all the privileges and immunities of domestic corporations. For although the citizenship of the individual corporators may under this clause, protect the rights of property and contract lawfully acquired by the corporation for them, it does not confer the right of acquisition in the corporate character, because that is not a right pertaining to the corporators merely as citizens, and because if it did pertain to them as citizens of their own State, it would still be a peculiar privilege derived from their own State, not belonging of course to citizens of another State, and therefore not guaranteed to the foreign corporators.

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It is then only by assuming that in view of this clause of the constitution, corporations are citizens of the States which create them, that they can be brought within the guarantee, so as to entitle the corporations

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of each State, to all privileges and immunities of corporations in the several States. But in view of the character and objects of the constitution, the phrase "all privileges and immunities of citizens," even when applied to natural persons, is restrained so as to embrace such privileges and immunities only as are fundamental and common to freemen in the several States. And if this restriction does not absolutely exclude corporations from the benefit of the clause except as to rights of property and contract lawfully acquired, the question would still remain, whether all the privileges and immunities of these artificial beings are to be considered as fundamental and therefore within the guarantee, and if not all, which of them are to be so considered. This enquiry would open a new field for construction or conjecture. And the fact that it has never been explored, and that no Court so far as we know, has ever yet decided that corporations are to be regarded as citizens under this clause of the constitution, and as such, entitled to its protection, is an additional reason to those already suggested, for not extending the operation of the clause by a strained and unnatural interpretation of the word 'citizen,' so as to include corporations, and thereby not only to introduce a new subject of construction and doubt, but a new element of discord and confusion, incongruous with the general spirit and character of the constitution and Union, and tending to the subversion of both.

Corporations created by one State, have no right to exercise its corporate power and privileges within the limits of other States without consent given.

We call the construction contended for, a new element, because heretofore in this Court, and as we believe in other Courts of the Union, the right of the corporations of one State to exercise their corporate powers within another State, so as to acquire rights there, has been regarded as a mere matter of comity, dependent upon the will of the State in which the exercise of such right is attempted, and subject to be interdicted by it, though in this family of States its consent might be presumed: *Lathrop vs Com. Bank of Scioto*, (8th Dana, 112.) *Atterbury vs Knox and McKee*, (4 B.

Monroe, 90,) &c. In the case of the *Bank of the U. S. vs Devoux*, (5th *Cranch*, 84,) the Supreme Court of the U. S., repudiated the idea that corporations could be considered as citizens, even so far as on that ground to determine their character as parties to a suit under the clause of the constitution giving to the Federal Courts jurisdiction between citizens of different States, and under the judiciary act of Congress defining the exercise of this jurisdiction; and the doctrine of that case was for many years followed in that and the other Federal Courts. And although in the later case of the *Louisville R. R. Company vs Letson*, (2 *Howard's Rep.*, 497,) this doctrine has been overruled, and the Supreme Court decided that a corporation "is substantially, within the meaning of the law, a citizen of the State which created it, and where its business is done, for all the purposes of suing and being sued;" we do not regard this decision upon a question of jurisdiction, as fixing upon corporations the character of citizens, except for the assertion of rights lawfully acquired and existing, nor indeed as going farther than to decide that they may be regarded as citizens, for the purpose of suing and being sued in the Federal Courts as citizens of the State of their locality, although some of the corporations might be citizens of other States.

There are, it is true, some expressions in the opinion, which indicate that corporations may be regarded as citizens to all intents and purposes. But in saying this, the Court went far beyond the question before them, and to which it must be assumed, that their attention was particularly directed. They make no reference to the clause of the constitution now under consideration. There is no reason to suppose that they deliberated upon it, or looked to the effect of its application to corporations regarded as citizens. They certainly did not undertake to construe this clause. And their decision that corporations are substantially citizens for all the purposes of suing and being sued, does not decide that they are citizens for all or any other purposes, or that

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they are to be so regarded under this clause of the constitution, or that they are entitled absolutely to exercise within any State but their own, all rights, or to enjoy all privileges and immunities of domestic corporations. Such a right cannot be conceded upon the authority of the case referred to. The privilege of suing, and the form of suing, and the question in what tribunal the jurisdiction as dependant upon the form of the suit, is to be entertained, do not reach the question of the privilege of acquiring the rights which are to be asserted in the suit. The exercise of this privilege, we think each State has the right to permit or refuse to the corporations of other States, and therefore to place under such burthens or restrictions as in its own discretion, it may deem suitable. So far as the privilege is freely permitted, the rights acquired under it are entitled to the same protection, or the same privileges and immunities, as other similar rights of individual citizens. But if it is permitted under condition, or subject to a burthen or tax, the rights acquired under such permission are subject to this burthen, though in other respects to be freely asserted or enjoyed.

The states have the power and right to impose upon corporations chartered by other States, a tax for the privilege of transacting the business in such State, though no such burthen be imposed upon like corporation chartered by its own Legislature.

It follows that in our opinion, the act of 1843, if it be regarded merely as an act imposing a tax upon foreign corporations, to which domestic corporations are not subjected, and as a burthen upon the privilege of exercising their corporate functions in this State, would not be inconsistent with this clause of the constitution of the United States, even if there be no equivalent burthen imposed upon domestic corporations in some other shape, as by the requisition of a bonus for their charter, or by the imposition of special duties to be performed for the public benefit. The enquiry, whether there is such equivalent burthen in a particular case is immaterial. The State having the undoubted right to impose conditions upon the acquisition and exercise of corporate rights created by its own laws, must have a similar right with respect to foreign corporations, and as it can discriminate between its own corporations in prescribing the terms of their creation, so can it dis-

criminate between its own and foreign corporations in prescribing the terms on which the latter may be permitted to exercise their corporate faculty, and acquire rights within its territory. And even if by its own constitution it could not in the imposition of taxes, discriminate between its own corporations and its own citizens, to the disadvantage of the latter, and whether it could or not, any restriction in this respect could not operate in favor of foreign corporations against whom it may discriminate, in favor either of its own corporations or citizens. Individual citizens of other States cannot complain of such discrimination, because, as such, they have no right to exercise their corporate functions here, but by permission, and because the discrimination supposed, leaves to them the same privileges and immunities which remain with the citizens of this State. But the entire discrimination made by the act of 1843, in favor of incorporated insurance companies and against individual citizens, is in allowing the former to ensure freely through the instrumentality of agents, which the latter can only do under the burthen of a tax. The tax is undoubtedly intended as a restraint upon the mode of making insurance, as well as a tax upon insurances made in a different mode. The right of the Legislature to create a corporation for the purpose of making insurances throughout the country, and by means of its agents, cannot be questioned. And as such a corporation is created, presumably, for the benefit of the community, with such capital as the Legislature may deem sufficient, and under such regulations as to its modes of business and its liability, as the public safety and interests may require; there may be in the very nature of the institution, and in the objects for which it was created and which it accomplishes, a sufficient consideration for such peculiar privileges as the Legislature may, in view of the services required, think proper to confer upon it. And as there may also be very sufficient reasons connected with the safety and interests of the community, for restraining the right of

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individuals to make insurance through agents whereby they might extend their contracts indefinitely, to the great detriment of the community. We cannot say that there is any usurpation or flagrant abuse of power in subjecting to taxation, and thus restraining insurances by individuals through the instrumentality of agents, and in exempting domestic insurance companies from the tax, when acting as they must do, to accomplish the purposes of their creation through a similar instrumentality.

In every view then, we think the act of 1843, is constitutional, and that the State was entitled to judgment against Milton for the tax imposed by that act, amounting to two and a half per cent., upon the premiums on the insurances effected by him, as agent of the "Columbus Fire and Marine Insurance Company."

Upon the case of the city of Lexington little remains to be said. The act conferring authority upon the city to tax Insurance Companies operating within its limits makes no discrimination between foreign and domestic companies. And there seems to be no objection to that act. But it is objected that the ordinance imposing the tax, exempts the Lexington Insurance Company, while it imposes a tax upon all agents or agencies of Insurance Companies effecting insurance within the city. If this be so, still the ordinance shows by its recital a sufficient consideration for exempting the Lexington Insurance Company from the license tax at the date of the ordinance, and the agreed case shows that this consideration had been continued from year to year by an annual contribution to the purposes of the city, equal to the highest sum which the city was authorized to require for license. This may be deemed a substantial compliance with the law so long as the city might choose to consider it as an equivalent to the license tax. And if it should not be so considered the proper consequence would seem to be, not that the tax as far as it was authorized should be deemed illegal and void, but that the Lexington Insurance Company might be sub-

The city of Lexington under the authority of the act of the Legislature has the constitutional power to tax a foreign Insurance Company operating in the city.

jected either to the tax or to the penalty for making Insurances in the city of Lexington without a license.

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In either view, we think the imposition of the license tax was valid as against the agencies of other Companies established and doing business in Lexington, and that the city was entitled to recover it against Milton as the agent of the Columbus Fire and Marine Insurance Company.

Wherefore the judgment against the State and the city is reversed and the causes are remanded with directions to render judgment according to the terms of the agreed case in favor of the State and in favor of the city for the sums due to them respectively, and for their respective costs.

J. Harlan, Atto. Gen., for the Commonwealth; Robinson and Johnson for the City of Lexington; Robertson and H. C. Pindell for Milton.

Isaacs, &c. vs Gearheart.

ERROR TO THE MARION CIRCUIT.

Ejectments. Sheriff's sale of Land. Estoppel.

JUDGE MARSHALL delivered the opinion of the Court.

THE sheriff having sold more land than the execution against Isaacs authorized, his sale and deed though verbally authorized and directed by Isaacs, were ineffectual to pass the legal title to Gearhart, the purchaser. This was decided upon the same deed, in the case of *Gearhart vs Tharp*, (9 B. Mon. 35,) and seems to be a necessary consequence of the principles laid down in *Pepper vs Commonwealth, for Thornton*, (6 B. Mon. 27,) and *Addison vs Crow and Jarvis*, (5 Dana, 271,) and

EJECTMENT.

Case 49.

July 10.

A sheriff cannot levy upon an execution, upon land, and sell more than is necessary to satisfy the same, & pass by his deed a valid legal title though the sale be with the assent of the defendant in the execution.

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other cases. The excess here is palpable, being to the amount of \$300, on executions requiring only about \$500 to be made. And the sale having been knowingly and purposely made of more land than was necessary for satisfying the executions, it derives no aid whatever from the execution, but is wholly void as an official sale. It was made however, by the express verbal directions of Isaacs, the debtor, and for his benefit. He was present at the sale, required the whole tract to be sold in order to avoid a sacrifice, received and afterwards collected the bond for the excess of the price, was satisfied with the sale, directed the purchaser to take possession which he did, offered to make a deed to him which he declined taking, and directed the sheriff to convey the land which the sheriff did or attempted to do by deed executed in his official character, but reciting the direction of Isaacs to sell the whole tract, &c. And after the purchaser had been thus in possession for some seven or eight years under his purchase, this action of ejectment was brought against him by Isaacs and his children, claiming under a voluntary deed prior to the levy.

The fact that a defendant in an execution authorized, the sheriff verbally to sell the whole of a tract of land being greatly more than was necessary to satisfy the execution, and received the overplus after satisfying the execution, did not confer upon the sheriff the power of passing to the purchaser the legal title by his deed.

The Court instructed the jury peremptorily, to find for the defendant; and it is contended in support of the judgment in his favor, that under the circumstances which have been stated, Isaacs was estopped from asserting title against Gearheart, who had been induced by his express authority and active participation to make the purchase and pay his money for the land. These circumstances undoubtedly created an equitable estoppel. They made the sale obligatory upon Isaacs as his act, and bound him to perfect it by a conveyance of his title, which he offered to do. But they did not authorize the sheriff to make the conveyance as his private agent, and they did not and could not give validity to his deed made in his official character as sheriff, and not in the name of Isaacs. His authority as sheriff is derived from the law and the process in his hands. And although while he keeps within the limits

of this authority, minor irregularities may be cured or authorized by the party concerned without impairing the official character and validity of the proceeding, the authority itself cannot be supplied or enlarged, so as to give official character and validity to acts not authorized by the law. And as the sale of more land than is necessary to satisfy the execution, is such an excess of authority as vitiates the whole sale, as an official act, and takes from every part of it the protection and authority of the execution, it must derive its whole character and whatever validity it may have, from the individual acts and private authority of those concerned in making the sale.

The parol authority given by Isaacs to the sheriff, though sufficient to authorize the latter to execute a writing for the sale of the land which would be binding upon Isaacs, was not sufficient to authorize a transfer of the title by deed even in the name of Isaacs. The return of the sheriff and his deed, though made in his official character, and not as the attorney of Isaacs, may in equity be deemed sufficient written evidence of a sale under the authority of Isaacs, whose consent to it is expressly shown in the deed. But the acts of Isaacs, though they bind him as a party to the sale, can have no greater effect in passing the title by estoppel, than similar acts accompanying a parol sale, or an executory sale evidenced by a writing signed by himself. In either case, though he might have induced the purchases by persuasion and received the whole purchase money and placed the purchaser in possession, he would not thereby have been estopped at law from asserting his legal title and right of entry in an action of ejectment.

The case of *Reed vs Heasley*, (2 B. Monroe, 254,) relied on to show that there was an estoppel in this case, was decided upon a principle not applicable to the facts now presented. Here the plaintiff, the debtor in the execution, relies upon the record of the sale to show that the defendant acquired no title by his purchase

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A parol authority to sell land may authorize the agent to give an obligation binding the principal to convey, yet it is not sufficient to authorize a sheriff, who sells more land than is necessary to satisfy the execution to convey the legal title to land so sold.

The case distinguished from that of *Reed vs Heasley*, 6 B. Monroe, 254.

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for the want of legal authority in the officer who made the sale; and the defendant attempts by evidence of parol facts to supply the legal authority which the record shows to have been wanting. In *Reed vs Heasley*, the position of the parties was reversed. The plaintiff, the purchaser under the execution relied upon a record which showed a valid sale; the defendant attempted to invalidate the sale by showing that he had only an equitable title which was not subject to levy and sale. But it was proved on the other side that he not only directed the levy but was present at the sale, without disclosing to the sheriff or bidders the nature of his title, and permitted the land to be offered and sold as his, and under the impression that he had the legal title. It was decided that these circumstances precluded him from afterwards denying the title of the purchaser on the ground of this extrinsic fact not appearing in the record of the proceeding, and not made known to others at the time of the sale. The case may be a complete precedent for estopping Isaacs from denying that he had title at the time of the sale, but is no precedent for estopping him from relying on the record of the sale, to show that the sheriff had as sheriff, no authority to make the sale, nor is it a precedent for allowing such authority to be made out by parol.

The instruction given by the Circuit Court cannot therefore be justified on the ground of estoppel. And as there is some evidence from which the jury might have inferred that Isaacs had been in possession of the land and that the defendant had acquired the possession from him, which would have been *prima facie* evidence of a previous title in Isaacs sufficient, if not transferred or otherwise lost, to authorise a recovery, the instruction could only be sustained on the ground that the circumstances under which Gearheart had obtained and held the possession, were such as entitled him to hold on, until there was a notice to quit or demand of the possession.

If he had not taken the sheriff's deed, but receiving the possession from Isaacs under a sale authorised by him and had held merely under the sale, he would as *quasi tenant* have been entitled to notice whether the sale was enforceable against Isaacs or not. But as he not only rejected the offered conveyance from Isaacs, but took a deed from the sheriff and held under it, and endeavored to sustain it on the trial as a protection to his possession, we think he was not entitled to notice to quit. And in fact it does not appear that he objected to the want of notice. The instruction to find for the defendant was therefore erroneous.

The deed from Isaacs to his children is not referred to in the bill of exceptions. If it was read as evidence, it precluded a recovery in the demise in the name of the grantor, as however inoperative it may have been as against his creditors it was valid against him, and passed his title. And as his title was not acquired by Gearheart, it remained in the grantees under the prior deed and is available to them in this action subject to such equities as Gearheart may have, as creditor or purchaser.

In any view of the case, the Court should not have given the peremptory instruction, but should have instructed hypothetically, if at all, leaving the facts to the jury.

Wherefore the judgment is reversed and the cause remanded for a new trial in conformity with this opinion.

Rountree and Fogle for plaintiff; *Shuck* for defendant.

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Notice to quit is not necessary when the tenant or *quasi tenant*, has received a deed and asserts title under it.

A deed though fraudulent as to creditors and purchasers is valid between the parties-

CHANCERY.

**H. Dowrey vs R. Logan.
R. Dowrey vs Same.****Case 50.****ERROR TO THE FAYETTE CIRCUIT COURT.*****Emancipation. Lost Records. Hires.***

September 25. JUDGE HISE delivered the opinion of the Court.

Case stated. HARVEY and Robert Dowrey, negroes, bring each separate suits in chancery in the Fayette Circuit Court, against Robert Logan, claiming that they had been entitled to their freedom since they had severally arrived at the age of thirty years, and alleging in support of their claim, that they are the children of Sukey Dowrey, who was the slave of one Wm. Frazeur, deceased. That Frazeur, in the year 1795 or 6, executed and acknowledged in the Scott County Court a deed of emancipation, by which it was provided that their mother Sukey Dowrey, should be free at the age of thirty years, and that the children to which she might thereafter give birth (she being then childless,) should each have their freedom as they severally arrived at the age of thirty years. That at the same time or on the same day, when the deed of emancipation was acknowledged, Wm. Frazeur sold and delivered their mother to Lucas, and that shortly thereafter, Lucas sold her to Moore, and that in the bills of sale from Frazeur to Lucas, and from Lucas to Moore, it was expressly stipulated and provided that Sukey Dowrey and the children born of her, should, as they respectively arrived at the age of thirty years, be free; that the deed of emancipation had been deposited and recorded in the Scott County Court Clerk's office, but that the deed and book in which it was recorded, was, with many of its other records, destroyed when that office was burnt down in the year 1837. That Moore conveyed Sukey

to Wm. Logan, the grand-father of the defendant, and whilst in his possession, she gave birth to the complainants and some other children, that some time before the institution of these suits the complainants had each arrived to the age of thirty years.

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The allegations
of defendant.

The facts charged that complainants are the children of Sukey Dowrey, and that they were over 30 years of age before their bills were filed, are not controverted in the answers, and are fully established by the proof. The complainants claim compensation for labor and service done and performed by them for defendant, after they were, as they allege, entitled to their freedom. The defendant resists this claim on the ground that even if the complainants are entitled to their freedom, as claimed by them, that their right was unknown to him, and that he held them in good faith believing them to be slaves for life, and that he was lawfully entitled to them as such.

The fact of the execution and acknowledgment of the deed of emancipation by Frazeur in 1795 or 6, is proved by one eye-witness, Wm. Moore, who was present at the time it was acknowledged, and who stated that it provided for the freedom of Sukey and her children as they should respectively arrive at the age of 28 or 30 years. Mrs. Frazeur also proves that by a deed of emancipation made by Wm. Frazeur, that Sukey and her children were to be free either at thirty years of age, or sooner. She states with much confidence, that she is certain of the fact that Sukey and her children were to be free at or before the age of 30 years, by virtue of a deed of emancipation made by Wm. Frazeur, and that it was so provided in the bill of sale of Sukey from Frazeur to Lucas.

The substance
of the proof.

John Lucas states that he frequently saw the bill of sale from Frazeur to his father, and that it provided for the emancipation of Sukey and her children as they should respectively arrive at the age of 28 or 30 years. He also states that both whilst Sukey belonged to his father and to Moore, he has heard Frazeur, Lucas, and

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Moore, all say that the deed or bill of sale, providing for the emancipation of Sukey and her children, was recorded in the Scott County Court. The burning of the Clerk's office of the Scott County Court in 1837, is proven, and that the record books of said office containing the deeds of older date than 1806, were probably destroyed by fire, as the oldest deeds found on the books preserved, are dated in 1806.

The evidence of these witnesses, to-wit: Lucas, Moore, and Mrs. Frazeur, who have no sort of interest in the matter in controversy, are of good credit and character, and whose statements concur in substance—has satisfied this Court that the complainants were each entitled to their freedom when they became 30 years of age, which was the case before these suits were commenced.

It is conceded that where it is attempted to disturb the possession of estates, and unsettle, or divest existing titles to property by parol proof of the contents of writings, deeds, or of records destroyed or lost for fifty or sixty years—that such proof should be very clear and satisfactory in its purport, and should proceed from intelligent and creditable witnesses; otherwise an open door and wide field would be presented for the commission of perjuries and the perpetration of frauds.

In the cases under consideration, however, the witnesses are reputable, seem to be intelligent, and concur in substance with each other, as to the contents of the deed of emancipation, and of the bills of sale above referred to. The important provision contained in the lost record and the bills of sale attempted now to be supplied by parol proof, was short, not complicated, but simple—and would be without difficulty correctly remembered, especially by the witnesses in this case, one of whom was the daughter-in-law of Frazeur, who executed the deed of emancipation; another is the son of Lucas, to whom Sukey was conveyed by Frazeur; and the other is the son of Moore, who purchased the woman from Lucas. They, no doubt, were familiar with

Proof of the contents of a deed of emancipation recorded and burned at the burning of the Scott County Court Clerks office held to be competent and sufficient to authorize a decree in favor of the negroes provided for by it.

the facts all the time, and had heard Frazeur, Lucas, and Moore, often acknowledge the existence and contents of the deed of emancipation, and of the bills of sale, as stated by them.

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These cases were properly consolidated and tried together. The Court below dismissed the bills erroneously. The complainants have not made out a state of case which entitles them to any compensation for labor and service performed by them for defendant, previous to the institution of these suits. It is not proven that the defendant had any notice or information whatever, until the commencement of these suits, that complainants were free at 30 years of age, or that they in bad faith held the complainants in bondage as slaves, knowing or believing that they were justly entitled to their freedom.

The chancellor refused to give hire to slaves emancipated beyond the period of bringing suit. The defendant not appearing to have had notice before that period of complainants' right to free dom.

Wherefore it is the opinion of this Court, that the decrees of the Circuit Court be reversed, and the causes remanded with directions that decrees be rendered in favor of the complainants, by which their freedom shall be declared and established.

Harlan and McKee for plaintiffs; *Kinhead and Breckinridge* for defendant.

Jenkins vs Edens.

CHANCERY,

ERROR TO THE GRAVES CIRCUIT.

Case 51.

Administrations.

JUDGE MARSHALL delivered the opinion of the Court.

September 25.

I. F. CONNER, administrator of Wm. J. Conner, Case stated.
having filed a bill for the settlement of his intestate's estate as being insolvent, J. G. Edens who had been

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vs
EDENS.

made a defendant as one of the creditors of said estate, filed his answer and cross bill in which he set up his claims; and alleged that the intestate had in his lifetime, obtained a judgment against T. D. Conner for upwards of \$88, which had been affirmed in the Court of Appeals, upon the writ of error of said T. D. Conner, with supersedeas. That the supersedeas bond was executed by said T. D. Conner and by John Conner, J. F. Conner, the complainant, and R. P. Jenkins. That an execution on the judgment against T. D. Conner, was returned no property found, and the judgment remains wholly unsatisfied, and that an action commenced by the intestate upon the supersedeas bond against all the parties thereto, had been dismissed by J. F. Conner after he became administrator, and the bond and the demand secured thereby, remain undischarged. This claim of the intestate was not mentioned in the bill of the administrator, nor in any manner disclosed by him; and Edens' making the complainant and the other obligors in the supersedeas bond, and also the surety in the complainant's administration bond, parties to the cross bill, prays that they be decreed to pay him the amount due on the supersedeas bond in satisfaction of his demands against the intestate.

The administrator answered, admitting substantially, the allegations of the cross bill, and consenting to a decree as therein prayed. He excuses the dismissal of the action at law, by the fact that he being an obligor in the bond, could not maintain the action on it as administrator of the obligee, but he gives no reason for not having disclosed this demand as a part of the assets of his intestate's estate.

The decree of
the Circuit
Court.

The other defendants except the surety in the administration bond, did not answer, and a decree having been rendered in favor of Edens against all the parties to the supersedeas bond for the amount secured thereby, (to be paid to Edens.) Jenkins prosecutes this writ of error for its reversal, for which two principal grounds are alleged, viz: 1st, that no process had ever been serv-

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ed on Jenkins; and 2d, that the decree should have been against the administrator and his surety in the administration bond.

As the first ground is true in point of fact, and Jenkins was not in any manner before the Court, it was clearly erroneous to render a decree against him. But the mere fact that J. F. Conner, one of the sureties in the supersedeas bond which is sought to be enforced, is also the administrator of the obligee therein, to whose debt the demand on the supersedeas bond is sought to be applied by Edens, furnishes in itself no ground for making the surety of the administrator pay the debt.

And although on the ground of mal-administration by the administrator, his surety might in a proper state of case, be made liable to the intestate's creditors for this debt as well as for any other, yet as in case he were so made liable, he might undoubtedly look to the supersedeas bond and to all the obligors therein, for his full indemnity, none of them would have any right to complain that the liability was thrown upon them exclusively in the first instance.

We are inclined to the opinion, that upon the case as made out upon Edens' cross bill, and the answer thereto, a decree could not have been claimed against the surety of the administrator. But as Edens is satisfied with the decree against the parties to the supersedeas bond, and as these parties have no right to complain that he has not taken a decree against the surety in the administration bond, the question whether he could have taken such decree, is in the present attitude of the case, of no importance.

It is further objected to the decree, that the demand on the supersedeas bond being purely legal, the Court had no jurisdiction to decree it in this proceeding, but should have left it to be collected by the administrator, holding him accountable therefor, as for other demands held in his fiducial character. We think however, that as the administrator was himself an obligor in the bond, it was competent for the chancellor having all the obli-

On a bill by an order under the statute of 1839, for selling and administering the estate, a creditor, suggesting a debt due to the estate and claiming the benefit thereof, has no right to tax the exclusive, but

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EDENS.

only has *pro rata*
share of such
debt.

gors properly before him, to decree the debt against them, and to do justice between them. But this should have been done not upon the cross bill of Edens, who had no right in this proceeding instituted for the very purpose of securing a *pro rata* distribution of the assets to appropriate this claim wholly to his own demand, while other creditors might be unsatisfied. The cross bill was entitled to no other effect but that of suggesting new parties and bringing forward assets not before disclosed, and which being a part of the intestate's estate should have been taken as a part of the general fund for *pro rata* payment of his debts. The administrator having made his answer to Eden's cross bill an amendment to his own original bill, and having made the other parties to the supersedeas bond, defendants to his suit, alleging the insolvency of T. D. Conner, the principal obligor. He should have been required to bring these parties before the Court, and the case should have proceeded just as if this matter had been stated and these parties made in the original bill; and the Court exercising the power of compelling payment by the complainant and other obligors in the supersedeas bond, should have directed a *pro rata* payment of the proceeds as in other cases. This record contains no report by the commissioner showing the amounts due from the estate, and to whom payable. And we are not satisfied that the whole sum decreed to Edens, is due upon his claims as stated by himself in his cross bill.

Wherefore the decree is reversed, and the cause remanded for further proceedings consistent with this opinion.

Pitman for plaintiff.

Graham vs Blount, on behalf of Graves MOTION..
County Court.

Case 52.

ERROR TO THE GRAVES COUNTY COURT.

Motions. Sheriffs.

September 27.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

Case stated.

THIS was a motion against a sheriff in the County Court, for a failure to pay to Robert T. Wright, a county creditor, the sum of two hundred and seventy-four dollars.

At the October term, 1849, a county levy had been made by the County Court, sufficient to pay the debt due to Wright, as well as the other claims against the county, but no order was then made directing its payment by the sheriff, out of the county levy. At the April term next, following, however, the court made an order allowing the claim and directing it to be paid out of the levy collected in the year 1850.

The sheriff having failed to pay the claim as ordered, he was notified by the attorney for the county, that a motion would be made by him, for and on behalf of the County Court, at its February term, 1851, for a judgment against him for its amount. The motion was heard by the Court, and a judgment entered against the sheriff, for the amount of the claim, and he has prosecuted a writ of error to reverse that judgment.

An objection is made to the proceeding upon the ground, that the motion was not made in the name of Wright, the county creditor. To enable a county creditor to maintain a motion in his own name against the sheriff, under the statute, he must not only have been a creditor, but his claim must have been specially provided for, and his name included in the list of county creditors when the levy was laid. *Walker vs Parker*, (4 B. Monroe, 97.) Wright could not therefore have maintained the motion against the sheriff in his name.

To enable a county creditor to maintain a motion in his own name against the sheriff, his claim must have been allowed and placed in the list of county creditors at the laying of the levy, (4 B. Monroe, 97.)

GRAHAM
vs
BLOUNT.

A motion against a sheriff for failing to pay money according to order should be made if the County Court be in the name of the justices of the County Court.

It is also objected that the motion was improperly made in the name of the attorney for the County Court. In strictness the motion should have been entered and carried on in the name of the justices of the County Court, instead of being made in the name of the attorney for the county for and on behalf of the County Court. The notice of the motion was properly given by the attorney for the county, but the clerk in entering the motion entered it informally. The mistake however, is one merely of form, and not of substance. The proceeding was substantially in the name of the justices of the County Court, and this objection must be regarded as unavailing.

The presumption should be indulged that a majority of the justices of the County Court were present in cases where the law required it.

It is further objected, that the order of the Court made at its April term, 1850, is invalid, because it was not shown that a majority of all the justices of the county were present and in Court, when it was made. As however, the law requires that a majority of the justices should be present, when such an order is made, and the Court assumed jurisdiction, the presumption should be indulged in a collateral proceeding of this kind, that the Court had acted legally, and had made the order, when it had competent authority to do it, especially as the County Court has exclusive jurisdiction over such claims. This presumption is not destroyed by proof, such as was made upon the trial, that the Court when it first met and organized at the commencement of the term, was constituted of three justices only. It may notwithstanding it was so organized, at its commencement, have been composed of the requisite number of members when the order in question was made, and the legal presumption that it was so constituted, is not repelled by the fact, that a majority of the justices were not present during the whole term of the Court.

When a sheriff has failed to settle his amount with the County Court, as re-

The only remaining question to consider, is the right of the justices of the County Court, to bring the motion, before they had settled with the sheriff, and ascertained by such settlement, the balance due from him.

The act of 1797, (2 vol. *Digest, Stat. Law*, 1115,) makes it the duty of the sheriff to settle and adjust the amount of his collection for the county with the County Court, on or before the first day of October annually; and if he fails to do so, the County Court is authorized, upon ten days previous notice to him of the contemplated proceeding, to enter up a judgment against him for whatever shall appear to be due from him.

GRAHAM
vs
BLOUNT.

quired by law,
he cannot object
on that ground
to judgment up-
on motion for
failing to pay
county creditors.

The proceeding in this case was not commenced until February, 1851. The sheriff had failed to settle with the County Court, on or before the first day of October, 1850, as the statute required. He had in his hands an amount sufficient to pay the claim allowed to Wright. He had failed to pay it, or to settle and account with the County Court according to law. He was not prejudiced by the trial on the motion, as he could have then relied upon every matter, that he could have brought forward on a settlement made with any two members of the Court. Having failed in his duty, and the time allowed by law for its performance having expired, he was liable to a motion in the County Court, to enforce the payment of the balance of the county levy remaining in his hands.

Wherefore the judgment is affirmed.

Mayes and Anderson for plaintiff; *Williams and Bradley* for defendants.

CHANCERY. Steam Boat Blue Wing vs Buckner.

Case 53. APPEAL FROM THE LOUISVILLE CHANCERY COURT.

Steam Boats. Diligence. Practice.

September 29 JUDGE HISE delivered the opinion of the Court.

*Case stated, and
decree of the
chancellor.* ROBERT BUCKNER, instituted this suit in the Louisville

Chancery Court against the Steam boat Blue Wing, claiming damages for injury done to his hay boat in the Kentucky river, by the former having run into and crushed her, through the mismanagement and negligence of the officers in command of the Blue Wing.

The master of the Blue Wing does not deny the charge that his boat come in contact with the complainants hay boat, and that it was somewhat injured and damaged in consequence thereof. But he denies that it was caused by any fault or negligence of the officers and crew of the Blue Wing, and rests his defence upon the ground that the collision occurred in the night, which was very dark, when it was raining, and the wind blowing fresh, that there was no light or watch on the hay boat to give warning as to her position, and that they accidentally run into her, not being able to see her in the darkness of the night, in sufficient time to avoid the collision and consequent injury done—that in the existing stage of the river, (which was rising,) the current set in towards the place where the hay boat was cabled to the shore, which carried his vessel in that direction as she ascended the Kentucky river, after passing through the lock.

By direction of the Court, a jury was called, empannelled, and sworn, who after having heard the evidence submitted, and the charge delivered to them by the chancellor returned a verdict for 135 dollars in damages, in favor of the complainant.

The defendant's attorney moved the Court for a new trial upon the grounds: 1st, that the Court erred in refusing to give the instructions asked by defendant. 2d, that the Court erroneously instructed the jury. 3d, that the law was not properly expounded to the jury. 4th, that the verdict of the jury was against the law and evidence.

SB BLUE WING
vs
BUCKNER
The substance
of the proof.

The motion for a new trial was overruled by the Court, and a decree rendered in favor of the complainant for the sum in damages assessed by the jury, and the costs of suit. The defendants excepted to the decision of the chancellor. The evidence was certified and spread upon the record, and they have appealed to this Court.

The proof in the cause clearly establishes the following state of fact: The hay boat was fastened close to the shore of the Kentucky river, with lines attached to both the bow and stern at Dean's landing—which is on the same side of the river with lock, No. 1, and is a usual landing place for flat-boats and other river craft, at which they frequently stop and lay up. The landing where the boat was cabled is between three and four hundred yards above the lock, No. 1, and more than 100 yards above the ground adjacent to the lock, which belongs to the State. Whilst the hay boat thus lay next the shore, there being no person and no light on board, the steamer Blue Wing in the night, which was quite dark, ascending the river passed through the lock No. 1, and the cabling above, the pilot then stopped the larboard, and continued working the starboard wheel, and caused the vessel to run along and next to the shore, until she struck the hay boat, and produced the injury and damage for which complainant has brought this suit. The river bends to the right above the lock, and it is not usual for steamboats after passing through the lock, to keep on next to the shore as was done in this instance, but to pass out into the middle of the river in the direction of the point on the shore opposite to that where the hay boat was cabled. There

Instructors moved in the Chancery Court by defendant, and refused.

SS BLUE WING
 vs
BUCKNER.

was another flat boat fastened on the same shore, and lying between the hay boat and the lock, which the Blue Wing passed and left uninjured, and yet struck the hay boat lying above. The proof does not at all authorize the conclusion that the collision was unavoidably produced by stress of weather or by force of wind or current. But the witnesses for defendants admit that it might have been avoided if the hay boat had been discovered in time, although they express the opinion that in the then existing stage of the river, it would have endangered the boat and the lives of those board, to have turned the bow of the steamer towards the middle of the river, immediately after passing through the lock and the cribbing above, as the force of the current might have carried her down the river and over the dam. But it is obvious from the proof that as they had abundant room to pass the lower flat boat without risk or danger, they could have still more easily have passed the hay boat which was cabled above at the usual landing place for flat boats.

Instruction given
 by the chan-
 cellor.

After the testimony was heard establishing in substance the facts above stated, the council for defendants moved the Court to instruct the jury as follows:

1st. If the jury find the collision was an accident, they must find for defendant.

2d. If the jury find that complainant neglected an ordinary and proper measure of precaution, the presumption is, that the collision was owing to his neglect.

3d. Though if the jury should find that the collision was partly attributable to the negligence of defendants, yet if they find that it was also partly attributable to the negligence of the complainant, they must find for the defendant.

4th. If the plaintiff's negligence in any way concurred in producing the injury, the jury must find for defendant.

5th. If it is doubtful whether the management or negligence of the plaintiff contributed to the accident, they must find for the defendant.

6th. If the collision occurred without blame being imputable to either party, the verdict must be for defendants.

See *Blue Wing*
vs
Buckner.

The chancellor refused to give these instructions as asked, and instructed the jury as follows:

"If the flat boat was lying in a place where steam boats generally run on such occasions, and the steam boat was managed with ordinary prudence, then the complainant cannot recover. But on the contrary, if the flat boat was in the place where such boats usually lay, and the steam boat was run out of the ordinary track of such boats, unless it was done by stress of weather, they should find for complainant. If the collision happened without fault of either party, then there can be no recovery."

The questions to be determined by this Court, are, should the instructions which were refused have been given, and were the instructions given erroneous?

Instructions containing abstract propositions of law, though conceded to be correct, should not be asked, and if asked, may be properly refused. If they are not applicable to, or based upon, the facts of the case as shown by the proof, they can have no other tendency than to confuse and misdirect the minds of the jury. So also a Court may properly refuse to give a number of instructions setting forth in substance, if not in form, repeatedly the same propositions of law, and may set forth the whole law of the case, and give the same in one single charge or instruction to the jury, so that it be correctly and impartially done according to all the proof in the cause. Nothing more or less has been done by the chancellor in this case.

A Court may properly refuse to give an instruction which is abstract, though the principle of law be correctly stated—or to give a multiplicity of instruction embracing the same legal principle and give one or more instructions embracing the law of the case.

If it were granted that each of the instructions moved by defendant's counsel as they may be construed by him, present correct legal propositions, yet they are, except such as are abstract and inapplicable, contained in substance within the instructions which the Court gave to the jury, in a form and manner more comprehensive and impartial, and defendant has no just ground

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vs
BUCKNER.

of complaint, as the whole law of this case was fairly expounded to the jury by the chancellor.

The first instruction asked by defendant would have been misleading, and ought not to have been given. The word *accident* when used to express a result produced by human action, is generally, if not universally, understood to mean a thing done, or a disaster caused or produced without design or unintentionally; and had this instruction been given, the jury would in all probability have directed their enquiry alone to the question as to whether the Blue Wing was brought into collision with the hay boat, with or without design, intentionally or unintentionally, and if done without design or accidentally, or if it was not intended, they might under this instruction have considered themselves as bound to find for the defendant, notwithstanding the injury was caused by a want of proper skill, or by the improper negligence and mismanagement of the officers and crew of the Blue Wing. As matter of law, if one vessel unskilfully and by faulty management or negligence runs into another and injures or destroys her, it is no sufficient excuse to allege and prove that it was done accidentally and without design. If there is fault, neglect, or unskilfulness, responsibility follows in such cases, whether the injury was done with or without design.

The 2d, 3d, 4th, and 5th instructions are all in substance the same—were doubtless intended for the same purpose, and were properly refused as abstract and inapplicable to the facts of the case, unless as matter of law, the Blue Wing is to be excused for the injury done to the hay boat, because it was a dark night when the injury was done, and the hay boat was unguarded and without a light on board. It is in proof, that the hay boat was empty, and that it is not usual for flat boats when laying up, cabled at a landing place, to keep either lights or a watch on board. The hay boat was lying up at Dean's landing, cabled, and her owner was guilty of no fault, or negligence of any kind, in the man-

McClure, &c. vs Harris.

ERROR TO THE ANDERSON CIRCUIT.

Liens. Dower. Seizin. Vendor and Vendee.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

EDMUND HARRIS, dec'd., was the owner of a tract of land containing about one hundred and sixty acres, which had been conveyed to him in the year, 1837. In 1841, he purchased from John G. Holeman another tract of land, containing about two hundred and fourteen acres, at the price of two thousand dollars. Holeman, at the time of the sale, held a bond for a conveyance on Samuel B. Petty, in whom the legal title still remained, which bond had been executed to Browning, and was transferred to Holeman after having passed through the hands of several intermediate purchasers. Petty conveyed the legal title to Harris, and the latter undertook to pay to Petty, out of the purchase money due to Holeman, about the sum of one hundred and ninety dollars of the original purchase money which was still due and unpaid, and to pay the remainder of the two thousand dollars to McClure and McBrayer, to whom Holeman owed that amount, and executed his notes to each of the parties, according to the agreement. To secure the payment of these debts, Harris executed a mortgage on the two hundred and fourteen acres of land purchased from Holeman, and also upon the tract of one hundred and sixty acres which previously belonged to him, but his wife did not join her husband in executing the mortgage.

A suit to foreclose the mortgage was subsequently instituted, and a decree having been rendered to sell the mortgaged property, and a sale made in pursuance thereof, both tracts of land were purchased by McClure and McBrayer, at the price of eight hundred dollars.

CHANCERY.

Case 56.

September 30.

Case stated.

12bm261
114 204
12bm261
132 303

McCLURE &c.
vs
HARRIS.

They then sold the one hundred and sixty acres to a man by the name of Ash, at the price of one thousand dollars; he agreed to take the title sold by the commissioner and accept his deed, and McClure and McBrayer were not to be responsible, in any manner, for the title to the land purchased by him. The sale under the decree was made in the year 1843; and shortly afterwards, Ash was placed in the possession of the tract of land sold to him. Harris continued to reside upon the other tract as long as he lived. In February, 1845, after his death, McClure obtained from Edith Harris, his widow, an instrument of writing in which she bound herself, "to make a general warranty deed to the farms and lands her husband, E. Harris, mortgaged to McClure and McBrayer, at any time she was called on, in consideration of the small amount of rents she was to give for the property that year." The same writing recited that McClure had leased to her the residence of E. Harris, dec'd., where she then resided, including the farm and mills for the year 1845, for which she was to repair and make good, all the fencing on the farm, and make and put in good head-gates to the mill race, and repair and keep the race in good repair during the year. And if the mills were sold during the year, to surrender the possession of them and the houses adjacent thereto, which however, was not to lessen the rents. The mills were sold by McClure during the year, at the price of six hundred dollars, and possession was given to the purchaser.

The pleadings of
 the parties.

In 1847, Edith Harris, the widow, exhibited her bill in chancery in this case, claiming dower in both tracts of land, in which she alleged that the aforesaid writing binding her to convey the mortgaged lands, was procured by fraud, and executed by her without a knowledge of its contents, or the most remote idea that in it, she promised to surrender her right of dower in any of her husband's lands. She made the mortgagees, and the purchasers of the mills and of the one hundred and sixty acres, and the heirs at law of her deceased hus-

band, parties to the suit. McClure and McBrayer denied the alleged fraud in procuring the execution of said writing, and contested her right to dower, independently of the writing, in the tract of two hundred and fourteen acres, upon the ground that the purchase money had never been paid by her husband.

**McCLURE &c.
vs
HARRIS.**

The Court below, decided that the widow was not entitled to dower in the last named tract, but was entitled to dower in the tract of land purchased by Ash, and as the purchase money paid by him had been received by McClure and McBrayer, that the widow might at her election, have the value of her dower in the Ash tract of land, assigned to her out of the other tract, and she having elected to take her dower in the tract upon which she resided, in lieu of her dower in the tract of land in the possession of Ash, it was assigned and decreed to her according to her election. From that decree McClure and McBrayer have appealed, and the widow by her cross errors contends, that the Court erred in not decreeing to her dower in both tracts of land.

The decree of
the Circuit
Court.

The validity of the writing executed by the widow, is the first question to be determined. A most remarkable feature in this transaction is the total inadequacy of the consideration. The only consideration specified in the writing itself, and the existence of no other is even suggested, was the small amount of rent she was to pay for the farm during the year, 1845. The farm was worth a rent of about fifty dollars, and the value of the improvements that she agreed to make was equal to at least half that amount. So that she was to surrender all claim to dower in her husband's lands for a sum not exceeding twenty-five dollars, and if she were entitled to dower in the land upon which she resided, for a much smaller sum, or rather without any consideration whatever, as in that case she would be entitled to the possessions of it free of rent, until dower was assigned to her. The language used in the writing is also peculiar. She was to make a general warranty

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deed to the farms and lands her husband mortgaged to M'Clure and McBray, at any time she was called on." There is nothing said in the writing about her dower right, nor is her interest in the land mentioned. The subscribing witness did not hear the writing read over, or know what its contents were. Another witness who was present all the time deposes that nothing was said by the parties about the sale or relinquishment of the widow's dower, but the contract related alone to the rent of the farm. The widow alleges that she made an agreement to sell or convey her dower interest in the land, that the contract was confined to the renting of the farm, and that part of it, binding her to make a general warranty deed to the lands was never read to her. There is no testimony of any negotiation between the parties in reference to the sale of her dower right in the lands. And we are satisfied, if the instrument of writing were read to her, that she did not comprehend the meaning of the language used in it, and if she had understood its legal effect that she would never have executed it. We think therefore in view of the circumstances mentioned that it was properly disregarded by the Court below.

The right of the widow to dower in the tract of one hundred and sixty acres in the possession of Ash, is clear and indisputable. Her right to dower in the land purchased by her husband from Holeman, and conveyed to him by Petty, depends first upon the question whether or not the creditors of the vendor, to whom the vendee executed his notes, had the vendors lien upon the land for the payment of the purchase money; and in the second place, if no such lien existed, did the execution of the mortgage by the husband to the vendors creditors have the effect of depriving the wife of dower as against rights under that mortgage.

The wife's right of dower, is subordinate to the vendors lien for the purchase money, because the lien is coeval with the husband's right to the land, and he acquires his title subject to the lien. As the title and

The right of a widow to dower in lands or subordinate to the lien of the ven-

the lien origiuate at the same time, the husband never has any right either equitable or legal unincumbered by the lien, and the wife's right of dower is therefore subject to the same incumbrance. But where no lien for the purchase money exists, and the husband acquires a clear and unincumbered title to the proper, the right of the wife to dower, is not affected by the fact, that the original consideration has not been actually paid.

In this case, the purchaser paid the purchase money so far as the vendor was concerned, by the execution of his notes for the amount, to the vendors creditors. No responsibility for the amount rested upon the vendor; his debts were paid, and so far as he was interested in the transaction, the effect was the same, that it would have been, had the purchaser, instead of executing his notes to the creditors, paid them the amount in money. The vendors lien therefore was extinguished, and was not transferred by operation of law to his creditors, nor was there any contract between the parties, that the creditors should have the benefit of the lien to secure the payment of their debts. Indeed it is apparent that they did not rely upon it, as they procured the vendee to execute a mortgage for that purpose upon that, and also another tract of land, which would have amounted to a waiver of the lien, if the debt had still been due to, and the arrangement made with the vendor.

The acceptance of other or additional security by a vendor, amounts to a waiver of his equitable lien. That no lien exists where a purchaser executes his note to a third person, at the instance of his vendor, was decided in the case of (*Collard vs Seamonds*, 9 B. Monroe, 265,) which is an authority expressly applicable to this case

Unless therefore the execution of the mortgage by the husband, in view of the circumstances, under which it was made, precludes the wife from asserting a claim to dower in opposition to the rights conferred by it, she is entitled to dower in the land conveyed by Petty, to her husband. The deed to the husband, and the mort-

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dor of the land held by her husband but when the husband obtains a conveyance and gives his notes to those persons & a mortgage upon the land to secure their payment his widow is entitled to dower.

The acceptance of other or additional security by a vendor of land, is a waiver of his lien. *Collard vs Seamonds*, 9 B. Mon. 265.

Where a vendor conveys and takes a mortgage of the same date as the deed of conveyance, there is such seisin in the

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husband as en-
titles his wife
upon his death
to dower in the
land: (*Tives vs
Steele, 4 Mon.
339.*)

gage which he executed bear the same date; and although it is not proved expressly, that the deed was made by an agreement, that the mortgage should be immediately executed, it may be fairly inferred, that such was the fact.

The effect of a deed and mortgage executed under such circumstances, has been the subject of conflicting adjudications. It has been held, that the husband was not sufficiently seized by such an instantaneous passage of the title, in and out of him, to entitle his wife to dower against the mortgagee: (*Maberry vs Brien &c., 15, Peters, Rep. 22; Stowe vs Tift, 15, John Rep. 485; Clark vs Mier, 14, Mass. Rep. 352.*) On the other hand, it has been decided by this Court, in the case of (*Tewis vs Steele, 4 Monroe 339;*) which was a case, substantially similar to the present, that the husband was beneficially seized, and the wife entitled to dower. That case establishes the doctrine, that instantaneous seizure, is not, *per se* inconsistent with the claim of dower but that any beneficial interest, in the husband no matter how slight or fleeting, will create a right of dower; denying it only where the grantee performs the part of a trustee, and is the medium merely, through which an interest passes to other persons. The case was decided upon mature deliberation, and after a careful examination of the conflicting opinions of other Courts. We consider the question therefore authoritatively settled in favor of the right to dower, and that consequently Mrs. Harris is entitled to dower in all the land embraced in the mortgage. The decree rendered was therefore to her prejudice, and must be reversed upon her cross errors.

Wherefore the decree is reversed upon the cross errors of the defendant, Edith Harris, and cause remanded, that dower may be assigned her in both tracts of land, and for further proceedings for that purpose, consistent with this opinion.

Lindsey and Hord for plaintiff's *Kavanaugh* for defendant.

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ASSUMPSIT.

ERROR TO THE MASON CIRCUIT COURT.

Case 57.

Limitations, Merchants Accounts.

September 30.

JUDGE CRENSHAW delivered the opinion of the Court.

Case stated

THIS is an action of assumpsit, instituted by the appellants against the appellee for goods, wares, and merchandise; and the only question which we are called upon to decide, arises under the plea of non-assumpsit within one year next before the commencement of the suit.

The law and facts of the case were submitted to the Court, and it gave judgment against the appellee for so much of the appellant's account only, as had been made with the appellee within twelve months before suit brought.

The appellants have brought the case to this Court, by writ of error; and it is insisted by them that the Circuit Court erred in not giving them judgment for the whole amount of their account—the goods, as they contend, having been sold upon a credit of twelve months, and the suit having been brought within a year after the account became due. The account commenced on the 8th of May, 1848, and terminated in November, 1849, and the suit was instituted on the 29th of April, 1850.

It was proved that it was the custom of the appellants, to sell their goods to their customers upon a credit of twelve months, and, that this custom was generally understood by those who were in the habit of dealing with them, and was generally understood and known in the neighborhood. But, it was not proved that the appellee had had any previous dealings in the store of the appellants, or, that he was apprised of their custom.

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Where goods are sold on a credit if suit be brought before the expiration of a year from the expiration of the credit the statute of limitations is no bar.

That it was the custom of the vendor of goods to wait twelve months with those who made accounts with him for goods will not be sufficient proof of a contract to do so with a particular individual especially when it does not show that the purchaser had dealt with the merchant before and knew his custom.

If the goods were in fact sold and purchased upon a twelve months credit, none of the account was barred by the statute of limitations, as the suit was brought within twelve months from the time that the price of the first article charged in the account became due. But, is the proof sufficient to establish the fact that these goods were sold upon a credit of twelve months? We think not. Besides the absence of proof that the appellee knew any thing of the custom of the appellants to sell upon a credit of twelve months, the proof is of a character so vague and uncertain, that it is hard to say what is its true import.

Is it meant that there was a mutual tacit understanding between the appellants and their customers, that the appellants were bound to wait with them twelve months for the goods purchased by them, or, is it meant simply, that it was the custom of the appellants to *indulge* their customers for that length of time, without being absolutely bound to do so? We apprehend that the proof means nothing more than, that the appellants were in the habit of indulging their customers for twelve months for the goods purchased by them, and not that there was a mutual implied agreement between them and their customers that the goods were sold and brought upon this credit. One of the witnesses says, "they made no bargain to wait twelve months for their accounts, but it was their custom to present them but once a year."

Notwithstanding this custom of the appellants to wait with their customers twelve months, we apprehend that, if within the twelve months, one of their customers was about to fail, they would be surprised to be told that they could take no steps by suit to recover the amount of his account, until the year should expire. But, whatever may be the meaning of this custom, we do not think that the proof in this case is sufficient to authorize this Court to say that the Circuit judge erred in the conclusion to which he came. It is a matter of fact, and not of law, whether the goods were sold to

the appellee upon a twelve month credit. By agreement, the law and facts of the case were submitted to the judge, and he determined that all the account was barred, except that part of it which had been made within twelve months before the institution of the suit, and we cannot say that he erred in the determination.

Wherefore the decree is affirmed.

H. Taylor for plaintiff; *Hord* for defendant,

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**Grundy's Heirs &c. vs Grundy, and
Beam vs Grundy's heirs, &c.**

CHANCERY.

Case 58.

WRITS OF ERROR TO THE NELSON CIRCUIT.

Surplus Land. Mistakes. Interest.

September 30.

JUDGE CRENSHAW delivered the opinion of the Court.

ZACHARIAH HOBBS, deceased, owned in his lifetime a tract of land in the county of Washington, supposed to contain 500 acres; and, after having sold 53 acres of the tract to Jesse Hobbs, he died, and the remainder of the tract descended to his only child, Lucy Grundy. And in 1829, Lucy Grundy and her husband, Joseph Grundy, conveyed the said remainder of the said tract, supposed to be 447 acres, to Samuel Grundy at \$6 per acre. In 1835, Samuel Grundy sold the same to David Beam, for the sum of \$4000, and in 1839, made him a deed of conveyance therefor. Joseph Grundy, died in 1844, and his widow, the said Lucy, in April, 1848, instituted suit in the Nelson Circuit Court, against the executors heirs and devisees of said Samuel Grundy, and against said Beam and John Thomas, who were in possession, alleging that she had recently ascertained that

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there was a considerable surplus in the tract, and claiming compensation therefor. In the progress of the suit the land was surveyed, and a surplus of 101 acres and 26 poles, ascertained to exist.

The executors and heirs of Samuel Grundy make their answer a cross bill against Beam, in which they allege, substantially, the ignorance of said Samuel of the existence of said surplus, and that they knew nothing of it until sued by said Lucy. They charge that their ancestor sold to Beam at \$9 per acre, and was not paid for all the land in the tract by more than 100 acres, and that the surplus was conveyed to Beam by mistake—the entire boundary having always been estimated to contain what the original survey called for, to-wit, 500 acres, when, in truth, it contained more than 600 acres.

Lapse of time is relied upon by the defendants to the original, and by the defendant, Beam, to the cross bill; and it is insisted by him, that the sale to him was in gross, being for a tract of land described in the deed to him as a tract containing 500 acres *more or less*, with a specific boundary.

There is a surplus of 101 acres and 26 poles, and, unless it appears that the parties intended to risk the quantity, whatever it might be, it is immaterial whether the sale was by the acre or by the tract as containing by survey so many acres. Where sales are made by the acre, a less surplus or deficit, it is true, will induce the Chancellor to afford relief, than where they are made by the tract, supposed to contain, or as containing by survey, so many acres. But whether sales are made by the acre or in gross, courts of chancery will give relief, if it appears that the parties were under a palpable mistake as to the quantity mentioned, and that that quantity is beyond what they intended to risk, or, is less or more than "might be reasonably calculated on as within the range of ordinary contingency." We are satisfied that, in this case, the parties were under a gross mistake as to the number of acres in the tract.

It is immaterial whether a sale of land be by the acre or in gross, a Court of Chancery will relieve where the parties labor under a palpable mistake as to the quantity, and that quantity is beyond what it may be they reasonably inferred intended to risk.

The locality, and price of the land, the large excess, and the times at which the sales were made, and the facts that the title papers had all described the land as a tract containing by survey 500 acres, and that it was so known and estimated in the neighborhood, forbid our coming to any other conclusion. If, therefore, lapse of time does not constitute a bar, the complainants upon the original and cross bills are entitled to relief.

It is contended by the counsel of Beam, that, although in cases of fraud, time does not begin to run until the discovery of the fraud, such is not, and ought not to be, the rule in cases of mistake. It is conceded by the counsel that, as the law is laid down in the case of *Crane vs Prather*, (4th J. J. Marshall, 77,) the rule is applied to mistakes as well as fraud; but it was urged in argument, that this is the only case which recognizes this doctrine, and we are respectfully asked to review it.

We have done so, and find the same doctrine recognized in several other cases, and also in Story's Equity.

We are of opinion, therefore, that the statute of limitations which, in these cases, is five years, did not commence running until by the exercise of ordinary diligence the discovery of the mistake was made, or until it *ought to have been made*.

Lucy Grundy states that she did not, until a *short time* since, discover the surplus. This is a very loose and indefinite statement. What she means by a *short time*, may be more than five, more than ten years; and, after such a lapse of time as intervened between the conveyance to Samuel Grundy, and the institution of her suit, her right to recover, if it depended upon so vague and uncertain a statement, might, and would be, very questionable. But, within five years before she commenced her suit, she was still a *feme covert*; the land which was sold was her land, and, for the surplus which was conveyed by her and her husband, she *in her own right*, and not as administratrix of her husband is entitled to recover, if entitled to recover at all. If, therefore, she had known of the surplus in her hus-

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Limitation does not run against claims for mistake until it is discovered.

Where a wife unites with her husband in the conveyance of her land and surplus is conveyed, the limitations does not run against her right to recover the surplus so conveyed until she became discover.

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band's lifetime, the statute of limitations would not have commenced to run against her, until she became discovert, and her suit having been commenced within five years after the death of her husband, she is not barred by the statute of limitations.

The question now occurs, whether the claim for the same surplus, set up by Sinuel Grundy's heirs and executors in their cross bill against Beam, is barred by time. The council of Beam assumes that, although the complainants allege that *they* did not discover the surplus until sued by Lucy Grundy, they do not state that their *ancestor* acquired no knowledge of it after his conveyance, and, consequently, he may have known it before his death. But they allege that, by a survey recently made, it was ascertained that the boundary contains "upwards of one hundred acres more than Samuel Grundy *ever knew or believed or supposed was contained in said boundary.*" And they state that they were ignorant of the surplus until sued by Lucy Grundy. These allegations we esteem sufficient to show, that the discovery was made within five years before their suit, and according to the principle laid down in the case of *Craig vs Prather, &c., supra* the statute of limitations interposes no bar, unless the mistake *ought to have been discovered* more than five years before the commencement of their suit.

Where a mistake is discovered or ought to have been discovered by the vendor more than five years before suit brought to recover for surplus land the chancellor will not grant relief.

In the case of *Ewin vs Ware, &c., 2 B. Monroe, 65*, it said, that the statute of limitations "should be applied, whenever the mistake had been, *or ought to have been*, discovered more than five years before the commencement of the suit." Relief was refused in that case, because, in the language of the Court, "the facts strongly conduced to show that the complainant was apprized of the surplus five years at least before he set up his claim, and that he had reason to believe (as it seemed probable,) at the date of his conveyance, that there was a surplus in the tract, and that, continuing to reside in the neighborhood, he ought, as a reasonably vigilant man, to have ascertained the existence and ex-

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tent of the surplus, and especially, as others in the neighborhood had knowledge of it from about the date of his conveyance to Anderson, and seemed to have no motive for concealing the fact".

It appears that, by the title papers in regard to the land in controversy, the survey has always been called and known as a survey of 500 acres, and there is no good reason to suppose that Samuel Grundy ever knew or believed, that there was a surplus in the tract. It is true, that he and his representatives continue to reside in the vicinity of the land, and they *might* have ascertained the surplus, but there is nothing to show that they *had* ascertained it, or even suspected a surplus until the original suit was brought. And there is no testimony to show, that it was known in the neighborhood by more than one man, Gregory. He says that some 10 or 12 years prior to the time of giving his deposition, he surveyed the land with "Wm. Knott as surveyor, and they made it contain 615 acres." It does not appear at whose instance he and Knott made this survey; whether Knott resides in the neighborhood; nor, whether he or Knott ever made known to others the fact which they had ascertained. It would seem, it is true, from the question which elicited this part of his deposition, that the complainants *might* have been informed of it, but at what time does not appear. Considering the time at which this survey was made, we conclude that Beam, must have been residing upon the land, and that the probability is stronger that he knew of its being made, than that Samuel Grundy knew it.

The facts, therefore, which appeared in the case in *2 B. Monroe, supra*, do not exist in this case. The complainants have, it is true, continued to reside in the neighborhood of the land, but it does not appear that they or their ancestor suspected or believed, that there was a surplus in the tract. There was nothing, therefore, to prompt them to take any steps to ascertain the certain number of acres which the tract contained. Had not the suit of Lucy Grundy been instituted, we

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perceive nothing to induce the conclusion that we should ever have heard of a suit on the part of the complainants in the cross bill for the surplus land. But, being sued themselves, they turn to their ancestor's vendee for the same surplus.

If they or their ancestor believed that a surplus existed, they ought to be required to have used ordinary vigilance to ascertain it; and such is the rule which is recognized and approved in the cases of *Crane vs Prather &c.*, and of *Ewin vs Ware &c.*, *supra*.

In the former case, the suit was not instituted under eleven years after the conveyance from Crane to Prather. Prather conveyed the same tract, with the same boundary, to Thompson, and Thompson sold the same, with the same description, to three persons, who, in dividing it, ascertained the deficit. Neither party had any reason to apprehend a deficit until, for the purposes of a division, the land was surveyed; and hence, it was decided, that there had been no *laches* in not ascertaining the deficit sooner. So with Grundy and his representatives—they had no reason to apprehend, so far as shown, that there was a surplus, until they were sued by Mrs. Grundy. There was, therefore, nothing to induce them to take any steps to find out the true quantity, when they thought it was correctly stated in the title papers. We are of opinion, therefore, that the complainants in the cross bill are entitled to relief.

It has been contended by counsel, that the surplus had been ascertained and settled in the lifetime of Sam. Grundy, but there is no admission, (as supposed,) nor proof that such is the fact.

The Circuit Court was of opinion, that the complainants in the original and cross bills, were entitled to relief, and decreed upon both bills the same amount of compensation, and this amount was ascertained by the contract price between Joseph Grundy and wife, and Sam. Grundy, and interest thereon to the time of rendering the decree. The price stipulated in the two

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sales being different, the measure of compensation should, of course, be different. The price stipulated between Joseph and Sam. Grundy was six dollars per acre, and that between Sam. Grundy, and Beam, being \$4000 for the whole tract sold, was at the rate of \$8 94 $\frac{1}{2}$ per acre. The surplus is 101 acres and 26 poles. In ascertaining the amount for which Mrs. Grundy is entitled to a decree, the surplus should be calculated at \$6 per acre, and at \$8 94 $\frac{1}{2}$ per acre to ascertain the amount which the executors of Sam. Grundy are entitled to.

The only remaining question is, whether interest should be given upon their respective amounts from the time of the respective deeds or contracts. And we are of opinion that, under the circumstances, it should not be given. The rule of compensation was investigated in the case of *Meriwether vs Lewis*, (9 B. Mon., 163,) and no case was found requiring as a general rule that interest should be given. The case of *Rogers vs Garnett*, (4 Mon. 271,) is there referred to, in which it is said that, whether relief should be had "by a re-conveyance of the surplus, or compensation at the contract price, or at the present value, would depend upon circumstances." And the Court add, "It is clear that the principle thus laid down, excludes from consideration, both interest upon the contract price, and rent for the use of the land, unless the circumstances of the case should make one or the other, an equitable ground of charge, and even then it would seem that this equity should operate only upon the question, whether the vendor should have the land itself, or its contract price, or its present value."

We have determined that as a matter of law, the complainants of both bills are entitled to relief. But, surely, claims which have lain dormant—one for at least seventeen years, and the other for at least thirteen, can demand from the chancellor no particular favor. After so great a lapse of time, it may be impossible to prove many of the facts which attended the trans-

The measures of compensation to the vendor for surplus land conveyed shall be the price per acre for the number of acres in the surplus, and interest for such time as the chan

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cellor in his
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the circumstan-
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may think it
equitable.

Interest in this
case given from
the time of fil-
ing the respect-
ive bills.

sactions, or transpired afterwards, which might destroy the right of recovery entirely. As a matter of law, Mrs. Grundy, whilst a *feme covert*, was bound to no diligence, and could be guilty of no *laches*, nor can be held responsible for any negligence of her husband; yet, who doubts but that, in fact, she was as free to act in search of this surplus when covert, as when discoverd, or that her husband would have agreed to unite with her in a suit to recover her rights. And, at no time, since the sales and conveyances were made, was it out of the power of any of the parties to ascertain the number of acres in this tract of land. Nothing was necessary but a surveyor, chain-carriers, and compass. They laid by, and failed to make an effort for the discovery. True, that, in accordance with what we understand to be the settled law, we decide that compensation must be made, but, when called upon to increase this compensation by the addition of interest, we have a right to look into the circumstances, and if they do not favor the call, to refuse it.

As a general rule a party ought not to be bound to pay interest until he is in default, and can it be said that he is in default until it is ascertained that he ought to pay? We think not. It may be said that the vendors had the use of the land, and, therefore, they ought to account for interest. But it may be replied, that it is by no means certain that the vendees have received a single dollar more profit by having in possession the whole tract, than if they had possession of the remainder only, after deducting the surplus. A vendee in possession has a right to surrender the surplus off one side or end of the tract, which it is probable, in a tract of the size of this, has not added any thing to his income. Besides, it is contrary to the policy of the law, to encourage men to sleep upon their rights with the expectation that they can wake up at any remote period of time, and receive the same countenance from the Courts as is extended to the vigilant; and this, to the disturbance of the tranquility of the community,

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the peace and happiness of families, and, it may be, to the ruin of some who had long reposed in fancied safety and security. We think that in cases like this, where one's rights can be ascertained *at any day*, and where there has been such long delay, it is, in general, extending the rule far enough, to allow a recovery of the contract price at any time within five years from the discovery of the mistake. It may be worthy of enquiry, whether, under ordinary circumstances, it would not be a safe and wholesome rule, to compel a party to make the discovery within five years, upon pain of forfeiting his claim. Nothing is more harassing and vexatious, than to have our security suddenly disturbed by the unwelcome salutation of a dormant claim.

We think, therefore, that interest upon the respective amounts arising from the surplus, should be calculated only from the time of filing the respective bills. But, Beam must be allowed to make his election to pay the money, or surrender to Grundy's heirs and devisees the amount of the surplus, to be laid off at one side or end of the tract.

Wherefore the decree of the Circuit Court upon the bill and cross bill, is reversed, and the causes remanded, that a decree may be rendered in conformity to this opinion.

Grigsby and Thurman for Grundy's ex'or.; B. Monroe and Wickliffe for Lucy Grundy; B. Hardin and Reed for Beam.

CHANCERY.

Colter vs Morgan's adm'rs.

Case 59.

ERROR TO THE WASHINGTON CIRCUIT.

Sheriffs. County Levy. Interest. Presumption.

October 1.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

Case stated.

YAGER, was qualified as a deputy of Vincent Morgan, the sheriff of Washington county, and executed to his principal with Colter, and others as his sureties a bond of indemnity, conditioned that he should perform all the duties of deputy sheriff, from the February, County Court 1835, until the February, County Court 1837, being the term for which Morgan, was commissioned as sheriff, and save Morgan, harmless and indemnify him against all losses or liabilities, which might arise from the misfeasance or malfeasance of said deputy, and should in all things well and truly, perform the duties of deputy sheriff, in each and every particular, as required by law. The bond was executed on the 24th day of March, 1835.

Morgan, having died, this action was brought by his administrators against Colter, on said bond of indemnity, and the breaches assigned in the declaration are, first, that at the April, term, 1836, of the Washington County Court, the said Court in pursuance of an act of assembly approved the——day of——1836, authorizing the Court to levy on *ad valorem* tax, ordered that the sheriff should levy and collect twenty-five cents on each and every \$100, at the *ad valorem* valuation on the property of the people of Washington county, as assessed by the commissioners for that year, and that as deputy sheriff, he had collected under this order, the sum of \$3268, 21 cents, which he had failed to pay over. Second, that at the October, term, 1835, the County Court had levied on each and every tithable the sum of fifty cents, and that 12 97 tithables were placed

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in the hands of said deputy, on which he collected the sum of \$580 50, which he had failed to pay over. That in consequence of these defalcations, Morgan, and his sureties had been sued, and a judgment recovered against them for \$13 15, subject to two credits of \$30, and \$89,76 cents, which judgment had been paid by Morgan, and his sureties.

Issues were joined by the parties on the pleas of *non est factum*, covenants performed, and *non damnificatus*, and during the pendency of the suit, William Prather, one of Morgan's, administrators, having executed a release to John Yocum, one of the sureties in the bond of indemnity, the release was set up and relied upon by Colter, in a plea of *puis darrien continuance*, to which the administrators replied that its execution had been obtained by fraud, and an issue was made upon that allegation. A verdict and judgment were obtained by the plaintiff's, for the sum of \$914, in damages, and a motion for a new trial having been overruled, this, writ of error is prosecuted by Colter, to reverse the judgment.

If the deputy, collected money, and failed to pay it over, according to law, whereby a liability was imposed upon his principal, the latter had a right to institute an action immediately, upon the bond of indemnity, without waiting to be sued himself, and without having first discharged the liability. But, if the sheriff, or his sureties were subjected to costs and damages by suit, the whole amount which he or they were made to pay, may be recovered by him, from his deputy, and his sureties, whether the same be paid by the principal, or by his sureties. *Robertson, &c., vs Morgan's, adm'rs.* (3 B. Mon. 307.) The averment therefore in the plaintiff's declaration, that the judgment against the sheriff had been paid by him and his sureties, was sufficient to enable his administrators to maintain the action, and to demand such damages, and costs, as were recovered of him, and his sureties in the suit against them.

It is however, contended, that the testimony does not sustain the verdict of the jury, upon the issues formed

A deputy sheriff who by his bond with surety to his principal, obligates himself to collect monies and pay over according to law, and, who fails to do so, is liable to his principal for the debt; the principal need to wait to be sued himself before suing the deputy; but if he be sued, and subjected to damages and costs the whole may be recovered from the deputy and his sureties. (3 B. Mon. 307.)

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on the plea of *non est factum*, and on the question of fraud, in the execution of the release, nor as to the amount for which it was rendered.

As it regards the execution of the bond of indemnity, the signature of Colter, as one of the obligors, was proved to be in his handwriting, and no testimony was introduced tending to establish the fact, relied upon to sustain the plea of *non est factum*, that alterations or additions had been made in the face of the bond, after it had been executed by him. The only witness who testified upon the subject stated that the body of the bond was all in his own handwriting, except the names of the obligors and the figures 24, being the day of the month on which it was executed. That however only proves that the witness wrote the bond, leaving blanks for the names of the obligors, and the date, to be filled up at the term of its execution. It does not prove, that Colter, executed the bond before the blanks were filled, nor is there any other testimony tending to prove it, and the fair presumption, in the absence of testimony upon the subject, is, that the blanks were filled at the time of, or prior to its execution by the obligors.

The alledged fraud, in obtaining the execution of the release, was a question of fact for the jury to determine. They decided that fraud, had been practiced in procuring its execution, and unless that conclusion was wholly unauthorized by the testimony, their verdict cannot be disturbed upon this ground. The release that was first written was not executed. The releasor was informed that by its execution he would release the other obligors. Another release was prepared and executed; and it was proved that by its execution the releasor did not intend to release Colter, but only to release Yocum, one of the obligors. Yocum, was examined as a witness, and testified that he knew the release that was executed would have the effect to release the other obligors in the bond, and that he did not communicate that fact to Prather. The release purports to have been executed in consideration of one dollar, and

that according to the testimony had never been paid. The jury had a right to infer from the testimony, that Yocum induced Prather, to believe that the release which he executed would not have the legal effect to discharge the other obligors in the bond from their liability. The release that was first drawn he was informed would have that effect; it was not executed, but another one was substituted for it, which was executed under the belief by him as proved by Yocum, himself, that it would not release Colter, but would only operate to release Yocum, from his liability. Besides, good faith required that Yocum, should have apprized him of the effect of the release which he executed, when he knew, as he admits he did, that he labored under a delusion upon the subject.

These facts, and circumstances, in connection with the additional fact that the consideration upon which the release was founded was merely nominal, justified the jury in their conclusion, that its execution was procured by fraud. And the Court did not err in refusing to instruct the jury, at the instance of the defendant, that if Prather, was advised of the legal effect of the release, before its execution, the law was for the defendant, because there was no testimony that such was the fact in relation to the release actually executed, and also because, its execution might have been fraudulently procured even if Prather, had been advised of its legal effect.

The objection to the amount of the verdict and judgment seems however, to be more formidable. Yager's defalcation as deputy, was proved to be \$786,45 cents, by the only witness who testified upon the subject, and of that sum, there had been paid by Yager, in July, 1837, the sum of \$295. By an order of the Washington County Court, made at its May, term, 1837, the sheriff was directed to pay the money in his hands into Court, on the first day of its next June term. If interest were computed from that time, the balance due after deducting the credit of \$295, would fall nearly one

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A sheriff, in a proceed against him for the defalcation of his deputy in not paying over the county levy, is not liable for interest accruing before the date of the judgment.

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MORGAN'S
ADM'RS.

hundred dollars below the amount of the verdict. But it was decided, in the case of *Graham, &c., vs the County Court of Washington*, 9 Dana, 182, that the sheriff in the proceeding against him for this defalcation of his deputy, was not liable for interest accruing before the date of the judgment, but only for the amount of levies unaccounted for. Interest therefore in this case should be computed only from the time the judgment against the sheriff was recovered. The verdict then is for an amount much larger than the testimony authorized, even if the cost of the proceeding against the sheriff be included, which appears to be a few dollars only.

But the objection to the judgment most relied upon is, that the defalcation of the deputy was for the special levy authorized by the Legislature, and imposed by the County Court, after the execution of the bond of indemnity, and the surety therefore was not liable, as he did not undertake that the deputy should do more than the law required at the date of the bond.

The sheriff is bound to discharge all the official duties imposed by law, as well such as the law required at the date of his official bond as those that may be thereafter imposed by law, and a deputy who obligates himself to his principle to perform all the duties of sheriff is bound in the same way to his principle.

The collection of the county levy is part of the office duty of the sheriff. The amount of the levy is fixed annually by the County Courts. The sureties may be presumed to contemplate the collection of the county levy by the sheriff, as laid by the County Court. The increase of the levy imposes no additional duty upon the sheriff; but that which is properly incident to the official, nor does the manner in which the County Court is authorized to collect the levy, whether by taxing the tithables, or by an *ad valorem* tax upon property in the county, have that effect. If the Legislature should increase the revenue tax, after a sheriff, had executed his official bonds, could it be contended with any plausibility, that the sureties were not liable, for the amount of the increased tax collected by the sheriff. It is the official duty of the sheriff to collect the revenue tax, and the county levy, laid to meet the ordinary expenditures of the county, the amount of each to be subject during his term of office, to legislative action upon the subject.

That the sheriff and his sureties, were liable for this special levy was decided by this Court, in the case of *Graham, &c., vs the County Court of Washington, supra*. The liability of the deputy and his sureties depends upon the liability of the sheriff. The bond sued on was conditioned, to save him harmless and indemnify him from all losses which might arise from the misfeasance or malfeasance, of the deputy. The sureties of the deputy are therefore, clearly responsible for his failure to pay over the special levy collected by him. The only available objection therefore, is the one made to the amount of the verdict, and for this error the judgment must be reversed.

Wherefore the judgment is reversed, and cause remanded for a new trial, and further proceedings consistent with this opinion.

Moorehead and Booker for plaintiff; *Haskin, Thurman, and Shuck* for defendants.

Ligon vs Triplett, &c.

APPEAL FROM THE HENDERSON CIRCUIT.

Parties. Former adjudication.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

TRIPLETT, HOPKINS, and GRIFFITH, sold and conveyed to OBADIAH LIGON, a tract of land containing four hundred acres, in Henderson county, and took from their vendee a mortgage upon the same tract of land, to secure the payment of the purchase money.

Obadiah Ligon, died without having paid the purchase money. After his death his vendors instituted a suit in chancery, to enforce its payment, by a sale of

CHANCERY.

Case 60.

October, 8.

The case stated.

13-11-51
115 608

LIGON,
vs
TRIPLETT, &c.

he mortgaged property. The mortgagor having died unmarried, his mother, brothers, and sisters were his heirs at law. Richard H. Ligon, one of his brothers administered on his estate, and he together with all the other heirs were made defendants to the suit. None of the defendants, entered an appearance, or filed an answer, although they were all regularly served with process. After a monitory decree had been pronounced, and day given, a final decree was rendered, under which the land was sold, and conveyed to the vendors, they having purchased the land at the sale made by the commissioner. The sale and conveyance were approved of, and confirmed by the Court.

The purchasers subsequently filed a petition, stating that the defendant Richard H. Ligon, had possession of the land purchased by them and refused to surrender it, and praying for an order requiring him to deliver it to them. He filed a response to the petition denying their right to the possession, upon the ground, that he had a better title to the land, which he did not consider himself called on, to set up and rely upon, in the suit to foreclose the mortgage, as his right to it, was not questioned or put in issue in that suit, and that he did not, and never did claim the land as his to heirs brother. The Court deemed his response insufficient, and ordered him to deliver the possession of the land to the purchasers. From that decision he has appealed to this Court.

The decision of the Court below was correct. The object of the law in requiring proper parties to be made to a suit in chancery, is to put an end to litigation. If the defendant had any other title to the land, than that which he had acquired by descent from the mortgagor, it was his duty to have asserted it in the suit brought to sell the mortgaged property. All the questions which might have been raised in that suit by any of the defendants, in opposition to the relief prayed for by the complainants, are concluded by the decree rendered therein. *Mitfords pleadings* 245, *Burk's heirs vs Hampton &c.*, 4 *Dana* 84. If a party to a suit in

All who are parties to a suit in chancery are concluded by the matters decided in that suit as to every character of claim they may have to the matter or thing in contest, and will not be prevented to re-examine their right in a second suit. *Mitfords Plead.* 145—(4 *Dana* 84.)

chancery, were allowed to hold in reserve, and bring forward on a future occasion, a claim to the property, which was the subject matter of the suit, legal controversy would be interminable. In this particular case, it would be unjust to the purchasers to permit the assertion of such a claim. The defendant remained silent, allowed a decree to be executed, without making known that he claimed to have any other title to the land, than that he acquired as one of the heirs at law of his brother. After this apparent acquiescence in the decree and and sale, it would be inconsistent with well established equitable principles, to permit him to rely upon his concealed title, to defeat or impair the rights of the purchasers.

Wherefore the order requiring the appellant to deliver the possession of the land to the appellees is affirmed.

Harlan for appellant; *B. Monroe* for appellee.

McDONALD,
vs
FLEMING, &c.

McDonald vs Fleming, &c.

CHANCERY. 12thm266
118 219

ERROR TO THE CAMPBELL CIRCUIT.

• Case 61.

Consideration. Alimony. Liens.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

October, 4.

RUTH McDONALD, exhibited a bill in chancery against ANDREW FLEMING, and WILLIAM H. HAMILTON, in which she alleged that the former was largely indebted to her for services rendered for him, in acting as his housekeeper and in the general management of his business, and also for money expended by her for his benefit, and that he had, for the purpose of defrauding her,

Case stated.

McDONALD,
vs
FLEMING, &c.

and preventing the collection of her demand, against him, conveyed his property to the latter, who had entered into a combination with him, to enable him to accomplish his fraudulent object.

It appears that the complainant and Fleming, had for a number of years, lived together and cohabited as husband and wife, and during that time, that she had occupied a house belonging to, or provided by the latter, who furnished the means necessary for their joint support, and, as he was necessarily absent from home a considerable portion of his time in consequence of his ordinary occupation, which was that of a pilot on a steamboat, she had been in the habit of attending to, and managing his business generally in his absence.

No action can be maintained by a female for services rendered as a concubine—it is against the policy of the law.

So far as the services for which compensation is claimed, were incidental to the illegal condition in which the parties lived, and the improper connexion subsisting between them, they are not of a character which the law countenances, or for which any action can be maintained. As she occupied the attitude of a wife, without having been one, the services she performed in acting as housekeeper, resulted from the position in which she had placed herself, and do not in law entitle her to any compensation. Indeed it is evident, that it was neither intended nor expected by the parties that she was to be otherwise compensated for such services than by the support that was furnished her. She was abundantly supplied with all the comforts and necessities of life, was well dressed and had money to expend at her pleasure; and it is exceedingly doubtful, whether all the services rendered by her for Fleming, exceeded in value the amount thus furnished by him. Be this however, as it may, it is wholly inconsistent with the policy of the law to encourage such conduct, by permitting a female who has continued to live for a series of years in a state of illicit intercourse with one of the opposite sex, when a rupture occurs between them, to maintain a suit for compensation for personal services. The law will not imply any promise to pay

for services rendered under such circumstances, the efficient cause and inducement to the whole transaction being illegal, it becomes illegal in all of its aspects, and consequently there is no valid consideration upon which such a promise can be implied.

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vs
FLEMING, &c.

But it is argued that although a promise made to induce cohabitation is illegal, and although the law will not imply a promise to pay for services growing out of such illegal intercourse, yet a promise founded upon past cohabitations made for the purpose of remunerating a female for the degradation of her past life, is legal and valid. And it is contended that after the rupture between the parties in this case, Fleming promised, if the complainant would not sue him, that he would pay her more than she could obtain by law. If the correctness of the doctrine contended for were conceded, still the promise relied upon is too uncertain and indefinite to be enforced in a court of law or equity. No amount was specified—no agreement was entered into by the parties. The communication at most amounted to a proposition to compromise, in which the whole matter was left open for future adjustment.

The complainant filed an amended bill in which she averred she had lived twelve years or upwards with Fleming, as his lawful wife, and that he had so acknowledged her during all that time, and she prayed that she might, if he upon that ground defeated the claim to relief asserted by her in her original bill, be allowed alimony against him for her support and maintenance.

If a proper case for alimony had been made out by the complainant, as Fleming, had recognized her as his wife, and presented her in that character to the community in which they resided, he might have been precluded from denying that she was in reality his wife. But there is no cause alleged in the pleadings as the basis of a decree for alimony. Neither cruel treatment, or abandonment, or any other fact is alleged as a reason why alimony should be granted. Nor was it aver-

Though a man who has recognized a woman as his wife might be estopped to deny it in a suit by her against him, yet no decree for alimony can be made unless there be allegation and proof to show a joint claim for alimony.

MCDONALD,
vs
FLEMING, & Co.

red by the complainant, that she is the wife of Fleming, but only that she had lived with him, as such, and been so treated and recognized by him. Besides, if abandonment had been relied upon, and a sufficient case presented upon that ground, by appropriate allegations for a decree for alimony, the abandonment would have been justified, according to the testimony, by the wife's unfaithfulness to her husband. She was therefore not entitled to any decree for alimony.

It appears however, that during the time the parties resided together, the complainant received about five hundred dollars, which went into the common stock. If this money was appropriated to the use of the defendant, it would be unjust for him to retain it, as the parties have separated, and have no longer community of interest.

The complainant in her amended bill alleged that she had advanced a part of the purchase money for lots No. 32 and 33, in the town of Newport, conveyed by John B. Lindsey to Andrew Fleming, and that she had in equity an interest in said lots to the extent of the purchase money so advanced by her. This amended bill was not answered, and therefore its allegations must be regarded as true; and they are in fact sustained by the testimony. As the legal title to the lots was conveyed to Fleming, a trust in favor of the complainant resulted from the fact that she paid a portion of the purchase money. The amount of the purchase money paid by her is somewhat uncertain, but we think it may be assumed from the proof, that she paid at least the sum of five hundred dollars. She therefore has in equity, an interest in said lots to the extent of five hundred dollars, and interest thereon from the 23d day of August, 1845, the time the purchase money was paid. As Hamilton had not paid for the property, although it had been conveyed to him, at the time she asserted her claim, and as the purchase money due from Hamilton at that time, exceeded the sum of five hundred dollars and interest thereon. she is entitled to a decree for that

Complainant lived with defendant as his wife, though not in fact so, she advanced money which the man paid for real property and it was conveyed to the man. Held that the woman had a lien upon the property for the sum advanced and interest.

sum. and has a lien upon the lots to secure its payment. Besides, she alleged in her amended bill, that Fleming and Hamilton had cancelled the contract of sale, and that amended bill not having been answered, the fact must be deemed to be as she has alleged. If the money should not be paid either by Fleming or Hamilton, within a reasonable time, to be allowed by the Court for that purpose, its payment should be enforced by a sale of the property. A decree for this sum of money is the only relief the complainant is entitled to.

Wherefore the decree dismissing her bill is reversed and cause remanded that a decree may be rendered in conformity with this opinion.

Lindsey and Stevenson for plaintiffs;

Todd's Heirs,
vs
Wickliffe.

Todd's heirs vs Wickliffe.

ERROR TO THE FAYETTE CIRCUIT COURT.

Wills. Lost Records.

CHANCERY.

Case 62.

October 7.

JUDGE CRENSHAW delivered the opinion of the Court.

JOHN TODD emigrated to Kentucky at an early day, whilst it was one of the Counties of Virginia, and obtained inchoate titles to a considerable quantity of land, much of which lies in and about the city of Lexington. In 1782, a battle was fought between the Kentuckians and Indians, at the Blue Licks, in which John Todd was slain.

Case stated in the bill of complainant in regard to the lost will of Robert Todd.

He left, at his death, a widow who was *enclent*, and a daughter, Mary Owen, his only child. His widow was subsequently delivered of the child of which she was *enclent*; but whether the child was born dead or alive is not satisfactorily shown; the probability is, it

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vs
Wickliffe.**

was still born, and, an abortion consequent upon the sad news to the mother of her husband's death in battle. We do not deem it important, however, whether it was born quick or still.

Mary Owen Todd, being quite a child at the death of her father, her uncle Levi Todd, was appointed her guardian; and grants for the lands aforesaid were issued to her as heir at law to said John Todd. She grew up, and intermarried with James Russell, by whom she had one child, John Todd Russell, who died at the age of about twenty two years. James Russell, also died, and his widow, the said Mary Owen, subsequently married the defendant Robert Wickliffe. And by an arrangement between him and his wife, all her lands, not in the adverse possession of others, were conveyed by them to Richard Chinn, and William Owsley, who reconveyed to said Wickliffe.

In 1844, Mary Owen Wickliffe departed this life, and, in 1849, this suit was instituted by the children and grand-children of Robert, and Levi Todd, in which they charge not only that John Todd, before he went to the battle of the Blue Licks, made a will, but that, by his will, the children of Robert, and Levi Todd, were made contingent devisees; that the said John Todd "devised all the lands to which he had claim, to his said child, Mary Owen, if she had child or children to inherit from her that is, if, at her death, she had no offspring living, nor descendant from her, the lands mentioned in said will were, by the testator, devised to the children of his two brothers, the said Robert and Levi Todd;" that diligent search had been made for copies of the will, and none had been found, that those who had seen authenticated copies of the will were clear in their recollection, that Mary Owen, was to have a life estate only in the lands, and if she had child or children, and their descendants, who should survive her, they were to pass to them, but if, at her death, no such child or descendant were in existence, then the said lands were to pass to the children of Robert and Levi Todd.

In an amended bill it is alleged, that John Todd, "published his will devising a portion of his estate to his surviving widow for life, and the whole of it, *to his child or children*, and if they should die without a living child to inherit it, then to the testators' *two brothers, Robert and Levi*, his companions in peril, *or to their children*. The appellants pray that defendant, Wickliffe, be compelled to convey the title of the lands to them, to surrender the possession, and for general relief.

Todd's heirs,
vs
Wickliffe.

The answer of
the defendant.

Wickliffe in his answer, without positively denying that John Todd, made a will at all, but putting the appellants upon the proof of it, denies that he made *such* a will as the one charged to have been made, and states that, if he made a will at all, it was made before he had any children; that "he cannot say what will he did or did not make, but that it has been his firm conviction, that he never made such as charged, or any will whatever, in which either the children of Robert or Levi Todd, or any of them, were mentioned, much less can he believe that he devised a life estate to his daughter, remainder in fee to Levi Todd's children, or Robert Todd's children."

The difficulty as to whether a will was, or was not, made, and, if made, what were its contents, arises from the fact, that, in 1803, the clerk's office of the Fayette County Court, where the will is alleged to have been recorded, was consumed by fire, with its records and papers on file.

The points of
inquiry in the
case.

The allegations of the bills are somewhat vague and indefinite, and are evidently made upon information derived from a source not clear and definite in recollection; but we will not enter upon a critical examination of these allegations, for, after so long a time as has transpired since the supposed publication, and even since a supposed copy was seen, any great accuracy, or certainty of recollection in regard to the language of the testators, could not be expected. We take the allegations to be substantially these: that John Todd, before he

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went to the battle at the Blue Licks, made and published his last will and testament, by which, after making some provision for his wife during her life, he devised the whole of his lands to his child or children, and, if they should die without children living at their death, then to his two brothers, Robert and Levi, or, to their children.

That a will was made and published by John Todd, in his lifetime, and recorded in the clerk's office of the Fayette County Court, no rational man can doubt. The fact is established by several witnesses of unimpeachable character, who had every opportunity of knowing—one of them was a member of the Court when the will was produced for record—one was a deputy clerk in the office, who remembers frequently to have read it, and to have copied it more than once. And yet, when all the circumstances exhibited by the record are considered, it seems to be very remarkable that, if, in fact, John Todd, did make a will, no copy has been preserved. By the record of *May's heirs vs Mary O. Russell, &c.*, filed in this suit, it appears that, as far back as 1788, long before the clerk's office was consumed by fire, and whilst the will must have been accessible, being spread upon the records of that office, or at any rate, on file, John May instituted a suit in which this very will was set up, which it was material to produce; that several copies had been procured before the office was burnt; that those who were interested in its preservation lived in Lexington, or its neighborhood; that an act of the Legislature was passed after the burning, allowing copies to be recorded; and yet, no copy can be found. But remarkable as it is, we can deduce no other conclusion from the facts proved, than that a will was made and recorded.

Premitting, for the present, other questions of minor importance, we will enquire what were the contents of this will? Has such testimony been adduced as satisfies the mind that the provisions of John Todd's will were those contended for by the appellants?

There are three witnesses upon whom the appellants mainly rely—Mrs. Judd, Mrs. Vance, and Mrs. Neely. And, were it a matter of any consequence, we would, in considering their statements, reject the declarations of Mrs. Irvine, not made in the presence of Mary Owen Todd, as incompetent, but it is deemed of but little moment whether her declarations are excluded or not. Mrs. Judd, in answer to the question, whether she ever heard Polly Todd, or her mother in her presence, talk about any will made by her father, John Todd, states: "They all told me that he made a will before he went to the battle, and that it was his will that, if Polly died without an heir, the property was to go to the Todd's, I don't know whether they meant that it was a written will, or was his will just so. I heard from Mrs. Irvine, that, when Col. Todd, left for the battle, she was pregnant, but neither he nor she knew it, and the child dying, it all went to Polly." And, in answer to the question, "~~when~~ she heard Polly say that her father made such will," she says: "It was at her mother's (Mrs. Irvine,) before she was married; she said if she were married, and had no children, it was to go to the Todd's her uncles, and their children." She states that, at this time, Polly was fifteen or sixteen years of age.

Mrs. Neely, testifies that, when her son-in-law, January, was removing some papers from an old desk which had belonged to Col. Irvine, in his lifetime, he came to her with a bond printed on parchment, and in the parchment bond was folded a paper, endorsed, "a copy of Col. Todd's will." She is asked "whether this copy contained any provision as to the manner in which the property should go, whether to his, Col. Todd's children, and, if they should die without leaving any children to inherit from them, it should go to the children of his brothers, Robert and Levi, and if otherwise, how?" She answers: "Col. Todd, directed in the will that, if he had no living children, it should go to the children of Robert and Levi Todd." She is then asked to state, "whether the provision in the will was or not

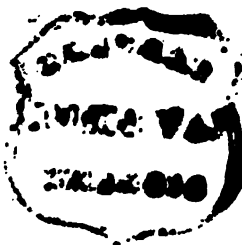
Todd's Heirs
vs
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The testimony
of the witnesses
examined.

Mrs Neely testimony in respect
to the will.

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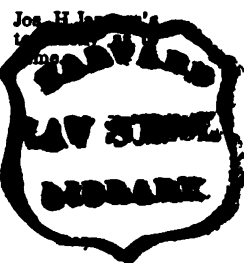
that, if his, Col. Todd's children had no children living at their death, the property should go to the children of his brothers, Robert and Levi." To this she responds: "I do not know whether or not; I did not notice the phraseology of the will particularly—I only noticed that part, as it astonished me very much, it being a thing I had never heard." Again she is interrogated thus: 'Can you say that the phraseology of the will was that, if Col. Todd, had no living children, his property should go to the children of Robert and Levi Todd, or, that it was that, if his Col. Todd's children had no children to live to inherit from them, that then the property should go to the children of his brothers, Robert and Levi? She responds: "My clear understanding of the will was that, if he had no living children, nor heir of his own, the property was to go to the children of his brothers, Robert and Levi. I do not know or recollect whether the will said any thing about their being living or dead; upon seeing a copy of the will, and never having before heard that there was a will, and knowing that the widow had taken her thirds of the estate, a very strong impression was made upon my mind, and it served as an explanation to many difficulties in the family which I had never before understood. One of the reasons was, Levi Todd's great watchfulness over the property after Mrs. Russell was a married woman, the feelings of the family were often hurt with him about it." Again she is asked: "Is it your recollection of the will or not, that if Col. John Todd's child or children, should die without leaving any child or children, his property should go to the children of his brothers, Robert and Levi." She answers: "I do not know whether he said living or dying, but my understanding was that, if he had no descendants of his own, his property was to go to the children of Robert and Levi—I know that he had a living child when he died, and expected another which I understood from the family was born after his death." She states, that there were only two sentences in the will; one in re-



gard to a deed to be made to Paddy Owens, and the other in regard to the disposition of his property; that there were only two names mentioned in the will, those of his brothers, Robert and Levi, and that their names were only mentioned as executors, and in connection with the devise to their children. It is deposed further by her, that it is her best impression the copy which she saw was an attested copy; the body was in an unknown hand, and the endorsement was in the handwriting of Col. Irvine.

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Her son-in-law, Joseph H. January, deposes that, in removing the papers from the desk of which she speaks, he found a bundle of papers containing a deed from Paddy Owens, and wife, to Col. Irvine, of fifty acres of land, and he is under the impression that, in the same bundle of papers, there was a copy of a will made by John Todd, which appeared to be duly recorded, and was signed by some Todd as clerk—he thinks Levi Todd,—but of this is not certain—it was on a sheet of cap paper, and was written nearly all over—recollects not much about the contents of the will except a clause of a “bequest” of fifty acres of land to Paddy Owens. He says these papers were found in 1825, or, 1826.



Mrs. Vance, testifies, that she has heard Mrs. Russell, afterwards Mrs. Wickliffe, say, if she should die and leave no children, and her son, John, should die and leave no children, the property should go to Robert Todd and Levi Todd's children. And, in answer to the question “whether Mrs. Russell spoke of the will expressing the way the property should go, she said, yes, *she* spoke of the property going to her father's brothers', Robert and Levi Todd's children.”

Mrs. Vance's
testimony as to
same.

Upon the testimony of these witnesses we have to ascertain the contents of John Todd's will, if they can be ascertained at all; and we have been at the pains to extract from their depositions all that we esteem pertinent and important, in order that we might more readily examine their testimony, and determine its true

Testimony of
witnesses compared and scrutinized, to ascertain the provisions of the will of John Todd.

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force. If the witnesses taken separately do not satisfy the mind, yet, if they give aid, support, and corroboration to each other, they may enable us to arrive at a satisfactory conclusion as to the contents of the will. Then, conceding full faith and credit to the witnesses, and combining their testimony, but, taking into consideration the lapse of time which intervened from the time their knowledge was acquired, to the time their depositions were taken; their intelligence, and the nature and character of their testimony, are we enabled to say satisfactorily, what were the provisions of this will?

Mrs. Judd, and her daughter, Mrs. Vance, appear to be women of ordinary intelligence, but the subject was not one in which they would likely feel an interest; they were not of kin to the parties; no subsisting relationship between them, either of blood, affinity, or otherwise, to prompt them to give an attentive ear to what was said; the time which has elapsed since they heard what they attempt to relate, has been long—not less than some thirty or forty years; their testimony is of the declarations of a person in the presence of the witness only—under all circumstances, the weakest, and most unsatisfactory and most dangerous testimony held competent by law. This is the nature and character of two-thirds of the testimony, upon which we are to endeavor to ascertain the contents of John Todd's will.

According to the first statement of Mrs. Judd, "the property was to go to the *Todds*, if Polly died without an heir;" we might enquire, which of the *Todds*? John Todd had a father, mother, three brothers, and two sisters. Only two, however, resided in this State, Robert and Levi. The witness, doubtless, had in her mind Robert, and Levi Todd, as she may never have heard of any other *Todds*; but the declaration which she mentions was not confined to Robert and Levi, but was sufficiently broad to embrace those without, as well as those within, the State. But the whole of what she says must be taken together, and she says further:

"She, Polly, told me, if she never married, and had no children, it (the property,) was to go to the Todd's, her uncles, and their children." Whatever might be the difference in effect, of these two different forms of expression, when critically analyzed, we are of opinion that they mean the same thing in substance; and that is, if Polly should die without an heir, the property was to go the Todd's and their children and that she means Robert and Levi Todd only, and their children.

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"Wickliffe.

Mrs. Vance is somewhat vague and unsatisfactory. She heard Mrs. Wickliffe say, if she should die and leave no children, the property should go to Robert and Levi Todd's children. In this declaration, no allusion is made to the will of John Todd. It appears to express simply the intention of Mrs. Wickliffe in regard to her estate. The counsel, conscious of this, asked her "whether Mrs. Wickliffe spoke of the *will* expressing the way the property should go," and she answers, "*yes, she spoke of the property going to her father's brothers, Robert and Levi Todd's children.*" Now this, perhaps, is saying no more than she had said before. It might be asked whether her answer, by a fair construction amounts to more than this: that Mrs. Wickliffe spoke of the *will*, expressing the way the property should go, and *she* (Mrs. Wickliffe,) spoke of its going to the children of Robert and Levi Todd. But, if she intended to say, as we are inclined to think she did, that Mrs. Wickliffe declared that the will of her father directed that, in the event she should die and leave no children, the property should go to the children of Robert and Levi Todd; it would be difficult to come to the conclusion that it would be proper to take a large estate out of one channel and place it in another, upon testimony based merely upon the confessions, or declarations of Mrs. Wickliffe, made thirty or forty years ago, in the presence of the witness only. It would not be an easy conclusion, conceding that her testimony is corroborated in every particular by that of Mrs. Judd,

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founded upon like confessions, and detailed after the same lapse of time?

A case in which the decision of the Court rejecting a deposition taken a second time by the same party and refusing leave to retake it was approved.

But we will turn to the testimony of Mrs. Neely, and ascertain whether, in it, any support is to be found to the testimony of Mrs. Judd, and of Mrs. Vance. And preparatory to an examination of her testimony, we will remark, that it is insisted the Circuit Court erred in overruling the motion of the appellants for leave to retake Mrs. Neely's deposition. It was a matter of discretion in the Court, and that discretion, in our opinion, was not only not abused, but properly and rightfully exercised. Complaint is made that she "was severely scrutinized, and catechized, and, in a manner calculated to excite and confuse her; that round-about, obscure, and vexatious questions were put to her." True, her examination was a long and tedious one, and no doubt embarrassing; but it must be remembered that she was first examined by the party at whose instance her deposition was taken, that her responses to their questions constitute the testimony desired to be explained; that not the slightest confusion is displayed in these responses, but considerable intelligence, coolness, and self-possession; that the same question in a different form was put by the appellants not less than three or four several times, and the same answer is substantially given upon every interrogation; when too, from the leading character of the interrogatories, no witness of her intelligence, as it seems to us, could mistake the answer which was desired or fail to perceive the *very point* to which an affirmative response was desired. Her mind was drawn directly and repeatedly, to the same question in a different form, which she pertinaciously answered three or four different times in the same way, and which she answers in *another* way when her second deposition is taken without leave of Court. Under these circumstances, if it were not discreet and proper to refuse leave to retake a deposition, we are at a loss to know what state of case would authorize a refusal.

The testimony of Mrs. Judd and Mrs. Vance, meets with no support from Mrs. Neely, except that, in *some event*, according to all three, the Todd's, or the children of Robert and Levi Todd, were to have the estate.

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But, did Mrs. Neely, ever see a copy of the will? There is no doubt in our minds, that she did see what *purported* to be a copy. It was endorsed, "A copy of Col. Todd's will." In whose hand-writing? In that of Col. Irvine. In whose chirography was the body of the will? She does not know, but says "it spoke of being an attested copy. Levi Todd was clerk, but she was not acquainted with his hand-writing. She says, "there were but two sentences in the will—one as regards a deed to Paddy Owens, and one as regards the disposition of the property; that there were only two names mentioned in the will—his brothers, Robert and Levi—the names of Robert and Levi were only named as executors, and in connection with the devise to their children." Joseph H. January, who saw the same paper, deposes, "that it appeared to be duly recorded, and a copy from the old record, and was signed by some Todd as clerk, and, he thinks, Levi Todd, but is not certain; that it was written upon a sheet of cap paper, and was written nearly all over."

Now this may, or may not, have been a copy of John Todds' will. The circumstance of its being found in the desk of Col. Irvine, who married the widow of John Todd, who was an executrix, is strongly in favor of its being a copy. And it was attested, and January says, the name of some Todd, and, he thinks, Levi Todd, was signed to it—this raises another presumption in its favor. But is the proof sufficient to satisfy the mind that it was certainly a copy? It may have been a true, or, an attempted copy of a copy. Neither Mrs. Neely, nor January, were acquainted with the hand-writing of Levi Todd—they cannot say, therefore, that it was a genuine copy from the original, or from the record. But, we are inclined to think, that the office having been burnt down in 1803, and an old

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paper having been found as this was, after considerable lapse of time, among the papers of the husband of the executrix, purporting to be a copy, it ought to be considered a genuine copy in the absence of any proof to the contrary.

Taking it for a genuine copy, it bears some evidence that Mrs. Neely, although a lady of intelligence and fine character, is, like all mankind, liable to err. She makes Robert and Levi Todd the executors, and, we believe, it is not disputed but that Mrs. Irvine and Robert Todd, were the only executor and executrix. If mistaken in regard to the executors of the will, may she not be equally mistaken in regard to its provisions in reference to the property? But the fact of her having made one statement in her deposition which was read upon the trial of this case, and another, in her deposition taken without leave of Court, essentially different from each other, is still a stronger evidence of her liability to mistake. It all shows the frailty of human memory, and how little reliance is to be placed upon our recollection of the language, or, even the substance of a written instrument after many years have gone by. Indeed, there is scarcely a competent lawyer who will venture to advise an applicant as to the meaning and effect of any devise in a will, upon his mere statement, although he may have come recently from its perusal. Before hazarding an opinion, he will despatch his client for the instrument, or for a copy. In this case, it seems, that Mrs. Neely and Mr. January cannot remember alike, even in regard to the *appearance* of the copy. She states that "there were only two sentences in it, and he, that it was written upon a sheet of cap paper, and written nearly all over." But, Patterson, concurs with her, that the will was a short one.

In all that we have said thus far, we have conceded to Mrs. Judd and Mrs. Vance good characters. But, from the proof in the cause, their characters are not good; and we think no great deal of credit is due to their testimony.

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John Todd, however, did leave a will. He was a man of energy, of talents, and of business habits. He came to the country at a dangerous time in our history; it was infested with savages, and perils were thick and imminent; no one knew when he was safe from the skulking, blood-thirsty savage; and it is reasonable to suppose, that such a man as John Todd would prepare and keep a will; and, it is equally reasonable to suppose that his brothers, or their children, in default of having children of his own, would be objects of his beneficence. *When* he made his will is not known; Mrs. Judd says that Polly and her mother told her he made a will before he went to the battle, but how long before, it is not said. In the suit of John Mays' heirs against Mary O. Russell and others, instituted in 1814, it is alleged that it was made about the month of November, 1780; but at what time it was in fact made does not appear in proof. We are inclined to believe that he kept a will by him, and that it was made before he had any children. Upon this hypothesis it is easy to see that the provisions of the will can be made to harmonize with the deposition of Mrs. Neely; and that is, "if he had no descendants of his own, the property was to go to the children of Robert and Levi Todd." He did have a descendant of his own, and, thereupon, any expectancy for the children of Robert and Levi was at an end. In this way, the conduct of Robert and Levi Todd can be accounted for, and in no other. It is utterly impossible to reconcile their conduct with the supposition of a contingent interest on the part of their children, in John Todd's estate. Nor, can it be supposed, if there were still a subsisting contingent interest in the children of Robert and Levi Todd, that the Legislature of Virginia, with the will before them, (as we must presume it was,) would pass an act for the sale of about one-fourth of the land, requiring no consent from the contingent devisees, or their guardian, and making no provision for their contingent interest in the proceeds of the sale.

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Robert and Levi Todd resided in the town of Lexington; Levi was the Clerk of the Fayette County Court, where the will was recorded; he was guardian for Mary Owen Todd, procured a copy of the will before the office was burned down; the Legislature passed an act admitting copies to be recorded; Mary Owen, when of age, made sales of quantities of the land; the Todds, themselves, became sub-venders of portions of it; Robert, in conjunction with the widow, apply to the Virginia Legislature for the absolute sale of one fourth of the lands; other copies of the will, besides the one for Levi, were procured; and no copy is preserved; none is recorded; no complaint is made of the act of the Virginia Legislature; no objection is heard to the sales made by Mary Owen; and still, it is insisted that the children of Robert and Levi Todd were interested in the lands. If so, the conduct of these two parents was unnatural and unaccountable. And, all these facts considered, it would be hard to conclude that the children of Robert and Levi Todd were interested, though Mrs. Judd, Mrs. Vance, and Mrs. Neely, all, concurred in making them so. It would be equally rational to suppose they were mistaken.

But it is insisted by the learned counsel for the appellants that, upon the supposition of an interest in the children of Robert and Levi Todd, there is nothing strange, or unaccountable in the conduct of the parents; that their children were only to have the property upon the death of Mary Owen, leaving no children; and, she having given birth to John Todd Russell, and capable from appearances of having other issue, the contingency was rendered so remote, as to destroy their hopes for their children. This state of case could not have been improbable in the mind of their uncle, and still, he did not think it useless to provide for the children of Robert and Levi, as the event of his daughter's dying without issue might happen. And, any provision which the uncle thought it proper to make for the children, was surely worth the attention of their fathers. They

might at least have taken some steps after the clerk's office and records were burned, to preserve some memorial of the will; if copies were not accessible, a suit might have been instituted to perpetuate the testimony, whilst there were living witnesses who had seen the will, and who could not well be mistaken as to its contents.

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To Mrs. Wickliffe are accorded, on all hands, an enviable reputation, and an exemplary life; she appears to have been endowed, in a high degree, with all the virtues for which her sex are so justly distinguished; she was the only living descendant of a worthy ancestor, and she eminently reflected his virtues. It is not easy to believe that a woman of her character, knowing it to be the will of her father that, in default of her issue, the children of her uncles should have an estate which he had acquired by the toils and hardships of a frontier life, amid perils the most threatening, would perpetuate the unfilial, ungrateful, and dishonest deed of frustrating that will.

Though the testimony may show clearly that a will alleged to have been made proved and recorded and the office burned, and the original and record thereof lost, was in fact made yet the proof held to be too uncertain to authorize the Court to say what were its contents, and that they were such as alleged by the complainant, and relief denied.

We believe that the will of John Todd contained some provision for the benefit of Robert and Levi Todd, or their children, but what that provision was, is a matter of uncertainty—we are inclined to the opinion, as already remarked, that the provision was such as Mrs. Neely stated it to have been; and according to that, John Todd, not having died without a descendant the contingency, upon which the children of Robert and Levi Todd were to take never happened. The testimony of Mrs. Neely, far outweighs, in our opinion, that of Mrs. Judd, and her daughters combined.

In any view which we have been able to take of the case, it was proper in the Circuit Court to dismiss the bill.

Wherefore the decree is affirmed.

Hewitt and Robertson for plaintiffs; *Morehead, G. B. Kinkead, and Preston*, for defendant.

CHANCERY.

Martin vs Martin.

Case 63.

ERROR TO THE MADISON CIRCUIT.

Usury. Administrations.

October 8.

JUDGE MARSHALL delivered the opinion of the Court,

Case stated and
decree of the
Circuit Court.

THIS bill was filed in February, 1846, by Robert Martin against John Martin, to recover a large amount of usury alleged to have been paid by the former to the latter upon various debts specified in the bill. The answer admits that two small notes were, as alleged in the bill, executed wholly for usurious interest, upon two large notes specified by the complainant, and that these four notes were paid by him as alleged. It must be considered also as admitting usury to have been included in two other notes which had also been paid, but denies the amount of usury charged, and relies upon lapse of time and the statute of limitations, and prays a set off for alleged deficiency in a tract of land purchased by him upon the representation of the complainant to whom it had belonged at the time of the purchase, that it contained a much larger quantity than is actually in it.

The two last mentioned notes on which the contest arises, being one for about \$1480, and the other for about \$504, both due on the first day of March, 1840, were executed in renewal of notes previously executed by William C. Thomas and Azariah Martin, who had been partners. The larger of these notes appears to have originated in the loan of \$500 about the year 1827. The other, by a loan of about \$250, or \$300, in 1832 or 1833. They were increased to their respective amounts by frequent renewals and compounding of interest at the rate of ten per cent. per annum. Before either loan was repaid, Azariah Martin died, and the complainant, Robert Martin, his father and sole heir,

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executed the renewal notes with W. C. Thomas, the surviving partner and as his surety. P. Bush who administered on the estate of Azariah Martin, sold the property of A. Martin and W. C. Thomas, as administrator, and under a power from W. C. Thomas and Robert Martin. At this sale R. Martin purchased a slave of the estate of Azariah Martin, and executed to Bush his note with security, for about \$875, the amount of his purchase, due the first of January, 1841. Upon the order of R. Martin, and a promise of indemnity from John Martin, Bush paid the two notes for \$1480 and \$504, by transferring the notes of divers persons executed for property purchased at the sale aforesaid, and among them the note of R. Martin for \$875, which was not completely paid until 1845. The two notes for \$1480 and for \$504, thus taken up by Bush, were afterwards delivered by him to Robert Martin upon his receipt for their amount with the interest. And R. Martin presented them for allowance in a suit brought by Bush as administrator, for the settlement of the estate of Azariah, which, as well as the entire property of A. Martin and Thomas, proved insufficient to pay their debts. In that suit there was a *pro rata* allowance of 80 per cent. upon all the debts, with interest calculated on them up to October, 1840. This *pro rata* was allowed to R. Martin in 1844, upon the said two notes presented by him, but he did not receive it for some years afterwards, and it does not appear that he received interest accruing after October, 1840.

John Martin in his answer, relies upon this allowance of 80 per cent. without any deduction on account of usury, as precluding the present claim. He also relies upon the record of a suit brought by Bush as administrator of A. Martin against him for the usury in the same two notes, shewing that the bill was dismissed agreed, as a bar. And Bush who was made a defendant to the present suit, claims a decree as administrator for four-fifths of the usury which may have been paid to John Martin on the debts of Azariah.

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The case was referred to a commissioner for the ascertainment of the usury paid, and with directions to take and report evidence. Upon his report, swelled to a great volume by numerous depositions impeaching and sustaining the characters of two of the complainant's witnesses, who depose as to the usury contained in the two notes now in question; the Court rejecting the claim for the usury in these notes, decreed to the complainant \$257 75 cents, on account of the principal and interest of the two small notes admitted to be wholly usurious.

The question
presented for de-
cision.

In revising this decree, the principal questions presented by the record and discussed by the counsel, relate to the application of the statute of limitations, and are, first, at what time did Bush take up the two notes of \$1480 and \$504, by transferring other notes for them. And second, whether the payment of the usury in those notes was complete at that time, or whether because one of the notes transferred was the note of R. Martin, who was also an obligor in the notes taken up by Bush, the transaction should to the extent of that note, be regarded as a mere continuation or renewal of the pre-existing debt, and as thus postponing the payment of the usury until the last note of R. Martin was discharged.

Upon this last question, we think there is no room for doubt. If Robert Martin had, in consideration of the two notes held by John Martin, transferred to him the notes of others for part of the debt, and executed his own note for the residue, the previous debts would have been thereby in part paid and extinguished by the transferred notes, and in part continued and renewed by the note of the debtor himself. And in that case the payment, as repeatedly decided by this Court, would have been applied to the real debt and its legal interest, and the usury would have been considered as being contained in the renewal note, and as remaining unpaid until that note was discharged. But this was not either the form or the substance of the transaction. The note of

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R. Martin for \$875 was not executed in consideration of the previous debts, nor to John Martin, the creditor who held them, but was executed by R. Martin in consideration of property of the estate of Azariah Martin purchased by him, and was transferred to the creditor by the administrator of that estate, just as the other similar notes were transferred, in discharge of the pre-existing debts. Being like the other similar notes a distinct and independent note and debt before the transfer, it did not any more than the others, lose its distinct character by the transfer, or become a part and continuation of the debt for which it was transferred. To shew that the identity of one of the obligors in the note taken up, and in the note transferred for it, does not determine the identity and continuance of the debt, we put the following case: A as principal, and B as his surety, are co-obligors in a note to C, which includes usury, A for the purpose of paying this and other debts sells his own property, and B becoming a purchaser to the amount of their debt to C, executes his note with surety to A who takes up the note to C, by transferring to him the note of B, which B some time afterwards pays. Most obviously, A has paid his own debt including the usury with his own property converted into the note of B, and B in paying that note, has only paid his own debt due for the property purchased by him. He has not paid the debt of A, for that was paid and extinguished by the transfer of his note. He has not paid usury to C because his own note was for the price of A's property without usury in it. His payment of his own debt gives no demand either against A as his principal, or against C for usury. But A has the right to sue for the usury as soon as he takes up the original note with that of B. In the present case, the original debt was due from A. Martin and W. C. Thomas, upon the death of A. Martin, R. Martin become bound for it as surety for Thomas, but it was still the debt of A. Martin and Thomas, so far as R. Martin is concerned, and was taken up by the adminis-

One who pays his debt in which there is usury, by the notes of others, may forthwith sue for the usury.

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A surety on a note in which there is usury which is paid by his principal cannot reclaim the usury.

trator of A. Martin, by the transfer of notes given up-on the sale of his property, and in part by the note of R. Martin, given for a portion of that property. The analogy between this and the case supposed, seems, therefore, to be complete. And if this transfer of notes by the administrator took place more than five years before the commencement of this suit, the demand for the usury by whomsoever made, is barred by the statute of limitations.

The question as to the time at which the original debts and the usury in them were paid, arises, not from any difficulty as to the fact itself, which is clearly proved by Bush to have taken place in March or April 1840, but from the failure of the defendant, John Martin, to answer specifically, a statement in the amended bill of the complainant, which after charging that P. Bush paid the two notes in question in the manner stated in paper A, exhibited in a certain record which is described, adds, "This payment was made on the 1st of March, 1841." And the bill goes on immediately to contend that as to \$875, part of the debt for which it says R. Martin was the surety of A. Martin and Thomas, this was not a payment until 1845, when R. Martin's note for that sum, due 1st January, 1841, and transferred by Bush to John Martin in part satisfaction of said debt, was paid—and calls upon the defendant John Martin, to answer and further to say as to the usury, &c., &c., &c. The answer of John Martin, denying the usury in the two notes, admits that they were paid as stated in paper A referred to, denies that the legal effect of the said payment was such as alleged in the amended bill—denies that complainant was surety of Thomas and A. Martin in the note for \$875, and says if there was any usury in either of the said notes, it was paid as stated in his answer to the original bill, and not in the payment of the note for \$875, but he denies that there was any usury in said notes, and adopts his original answer on that subject.

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Upon looking to the original bill and answer, we find that the former is rather confused in its statements as to the date and time of payment of the two notes in question, and the time up to which interest and usury were included therein, leaving it uncertain whether it was up to the 1st of March, 1840, or the 1st of March, 1841. The answer denies that the loan of \$500, was renewed and compounded with usury up to the first of March, 1841, (as is expressly alleged in the bill,) and alleges that the last notes for the two loans were due the first of March, 1840. And that Bush paid them on the order of the complainant by notes taken on the sale of property, &c., as already stated. There is no specific statement as to the time of this payment either in the bill or the answer. The paper A, referred to by both parties bears no date, and in the statement of the transaction does not show when it took place, but might apply as well to a settlement on the 1st of March, as to one on the 1st of January, 1841, and as well to one in the March or April preceeding as to either of the other dates. It shows however that some of the notes transferred in payment including that of R Martin, were due on the 1st of January, 1841. And that one was due on the 1st of March, 1841. And as the amended bill does not say that this settlement took place on the 1st of March, 1841, but that this payment took place at the latter date. And goes on immediately to speak of the legal effect of the transaction, the defendant might have supposed that in stating that the payment took place on the 1st of March, 1841, the complainant meant to assert that in legal effect it took place at that time, because the interest on a balance of the debt was calculated up to that time at which one of the notes transferred in payment fell due, and under this supposition he might have considered his denial of the legal effect of the transaction, being such as alleged, as being a denial of the entire allegation as to time of payment.

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One creditor may not claim to have the exclusive benefit of a debt due the intestate, from the fact of his bringing such a claim to the notice of the administrator in a suit for distribution under the act of 1839—he is only entitled to his *pro rata* of it.

It may be questioned whether the defendant is entitled to this liberal and indulgent construction, without which, he could not have any benefit from the evidence contradicting and falsifying the allegation which he has failed to answer. But we do not deem it necessary to decide this point, because upon other facts relating to this payment, we are of opinion (as contended by the counsel,) that Robert Martin is not entitled to sue for the usury paid by the property of the original debtors W. C. Thomas and Azariah Martin; but that the right of action or suit therefor vested in Bush, who, as administrator of A. Martin, and as attorney for his heir and his partner, sold the property of the real debtors, took the notes therefor, payable to himself, as he had a right to do, and applied them to the payment of their debts; and who, although he has in this manner paid this debt in full, has not paid, and has not the means of paying other debts, and therefore should recover this usury for that purpose, if it is recoverable at all. The bill does not allege that he refuses to sue for it, but he has in fact demanded a large part of it by cross bill in this suit. Nor could the present complainant, if he recovered the usury, hold it free from the debts of A. Martin and W. C. Thomas. His being himself one of their creditors, does not entitle him to sue for a demand which should be appropriated to the benefit of all.

We are of opinion therefore, that the complainant has no right to complain that his claim for the usury in the notes for \$1480 and \$504 30 cents, paid in fact, more than five years before the institution of this suit, and out of the property of the real debtors, and not of himself, has been rejected. Nor do we perceive that injustice has been done in calculating the interest on the two small notes for usury. There is no allegation nor proof that usurious interest was paid on these notes. The usury actually allowed in the decree as paid on the two small notes, was paid wholly by the property of the complainant, and P. Bush having no

interest therein, his cross error assigned upon that point is not available. He has not complained of the decree in any other respect, and his cross bill does not seem to have been disposed of. The claim of John Martin for a set off on account of a deficiency in the land was properly rejected, because, if it be properly a subject of set off in this case, the facts by which it might be sustained, are not proved except by depositions taken before the Master Commissioner, and which were excepted to because that part of the case was not referred to him, and he had no authority to take the evidence on that subject. The cross errors of the defendant, John Martin, as to this matter, are therefore not sustained.

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With regard to the costs in the Circuit Court, which were decreed against John Martin, we see no ground for reversing the decree.

Wherefore the decree is affirmed.

Turner for plaintiffs; *Caperton and Huston* for defendants.

Scarce vs Page, &c,

CHANCERY.

APPEAL FROM THE HICKMAN CIRCUIT.

Administrations. Sheriffs. Distribution.

Case 63.

JUDGE HISE delivered the opinion of the Court.

October, 2.

Case stated.

In the year 1841, Seth Cook died intestate in Hickman county, Kentucky, leaving an estate in slaves, goods, and chattels, and choses in action, of the value of several thousand dollars. At the March term of the Hickman County Court in 1841, Price Edrington was, by the order of that Court, appointed administra-

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tor of the estate—was duly qualified, and executed his bond as such, according to law. Edrington as administrator under this appointment, took the estate into his possession and entered upon its administration. He returned an inventory and appraisement, and sale bill, which were filed and recorded, and disbursed a small portion of the assets in the payment of debts, as he alleges in his answer. The securities in his official bond becoming apprehensive of future liability, proceed against Edrington in the Hickman County Court upon motion for counter security, and he failing to furnish such security, the Court at their April term, 1842, make an order that Edrington be removed as administrator, and that the sheriff should proceed forthwith to take into his possession the estate of the intestate and safely keep the same, subject to any future order of the Court. At the date of this order, E. T. Wright was the sheriff of Hickman county, and L. D. Stephens was his deputy. Edrington delivered over to Stephens as deputy sheriff, the assets remaining in his hands belonging to said estate, for which, Stephens executed his receipts; afterwards, E. S. Watson was appointed deputy sheriff of E. T. Wright, to whom, it is presumed, Stephens delivered the assets which he had received from Edrington.

The County Court of Hickman, at its February term, 1844, ordered that E. T. Wright, the sheriff, should make a settlement with the county commissioners, appointed and authorized for such purpose, of his administration of said estate.

And on the 14th of February, 1844, the said commissioners make and report their settlement with E. L. Watson as deputy sheriff of E. T. Wright, showing that at that time, upon the report of this deputy, the said estate consisted of uncollected claims amounting to \$2003 95½, and of a balance in cash after allowing credits for disbursements, amounting to \$136 41½. This settlement was approved and recorded. Then at the March term of the Hickman County Court, in 1844,

when, it is presumed, the term of office of E. T. Wright had expired, and when the defendant, Lewis Scarce, had been commissioned as sheriff of Hickman county, the Court by its order directs "that the clerk of the Court hand over to the sheriff of the county all the papers and evidences of debt belonging to the estate of Seth Cook, dec'd., and that the sheriff proceed to collect all demands due said estate." At the date of this order the facts are not questioned that Lewis Scarce was the sheriff of Hickman county, and N. E. Wright was his regularly appointed deputy.

The assets of said estate in the form of uncollected debts and money, was, on the 5th of March, 1844, delivered over to N. E. Wright, deputy sheriff of L. Scarce, in pursuance of the order by the clerk of the Court, to whom, doubtless, they had been previously surrendered by E. L. Watson, who had been deputy sheriff under E. T. Wright, and to whom a receipt is given by N. E. Wright, D. S., for L. Scarce, the sheriff of Hickman county. At its November term, 1844, the sheriff of the county, by an order of the County Court, is directed to sell on 12 months credit, one, or two, of the slaves belonging to the estate, as might be necessary for the payment of debts.

Two slaves under this order were sold by N. E. Wright, who as it appears, received the proceeds and applied them, together with the whole estate in his hands, to his own use, or squandered and wasted the same, without ever having been brought to a settlement with the County Court, or before the county commissioners. After the lapse of three years and more, the County Court in the meantime having failed to take any further steps to preserve the estate, or to withdraw it from the hands of N. E. Wright, or to commit it to the successor of L. Scarce in the office of sheriff—Thos. S. Page, with other creditors of the estate of Seth Cook, dec'd., in August, 1847, filed their bill against the said sheriff, L. Scarce, and all the securities in his official bond, against N. E. Wright, deputy

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sheriff, and against the heirs and distributees of the intestate, in which they insist that Scarce and his securities shall be held responsible for the whole estate, which, under the order of the County Court of March, 1844, was placed in the hands of his deputy, the said N. E. Wright; they demand a settlement of the estate through an auditor of the Court's appointment, and ask the Court to render a decree in their favor, against L. Scarce and his securities, for the amount of their several demands, and for general relief. L. Scarce, the sheriff, and two of his securities, namely, H. Wright, and S. P. McFall, answer and deny that they or either of them, are responsible according to law, for the defalcations of N. E. Wright, the deputy sheriff, into whose hands alone, the assets of said estate were committed. They deny that the County Court of Hickman had jurisdiction or lawful authority to make the order of March, 1844, directing the clerk to deliver the assets of said estate to the sheriff or requiring the sheriff to collect them, they deny that Scarce ever received from the county clerk or from any other person the said estate, or any part of it, but they suppose that it was placed in the hands of N. E. Wright, and insist that he, and not they, is responsible.

The decree of
the Circuit
Court.

The auditor who had previously been appointed for that purpose, ascertains the amount of said estate, and makes his report, showing that amount to be more than sufficient, if available, to pay all the debts of the intestate, leaving a considerable balance to be divided amongst the distributees.

The Circuit Court decreed that the defendants, L. Scarce, and his securities, should pay to the complainants in the bill, the amount of their several demands, and that they should pay over to the distributees the balance of the estate left after the payment of the debts.

From this decree Lewis Scarce, the sheriff, and the securities in his official bond, have appealed to this Court.

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w
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A question for
decision.

The question presented in this case for the consideration of this Court, and so far as recollected, for the first time, is one of much importance, and the settlement of which, is a matter of considerable interest to the community. It is this: Have the County Courts lawful authority and jurisdiction to commit the estates of decedents into the hands of the sheriffs of their respective counties, and charge them with the administration thereof, in cases where an administrator had been previously appointed and removed; and are the sheriffs so ordered to take charge of, and administer estates, and the securities in their official bonds by law responsible for delinquencies, with respect to the preservation, due administration, and distribution of such estates, by suits in chancery instituted by the distributees or creditors, whether the sheriff does, or does not, assent to such order, or take the estate himself, but which is delivered to, and received by his deputy.

This Court has decided in the case of *Williams and others vs Collins and others*, (1 B. Monroe, 59,) that the sheriff and his securities may be held responsible in chancery at the suit of distributees for settlement and distribution, in a case where an estate by order of the County Court is committed to the sheriff after the expiration of 3 months from the death of the intestate, and where there had been no previous appointment and removal of an administrator. That the County Court having the power to appoint the sheriff, the legal duty and obligation is imposed on the sheriff to act in such cases, and he, officially, and his securities in his official bond, should be held responsible to those interested, for his delinquencies. But it is contended, that in this case, the sheriff and his securities are not responsible, because the County Court of Hickman county had no power under the 57th section of the act of 1797, (1st Statute Law, 670,) to charge the sheriff with the custody and administration of the estate of Seth Cook, dec'd., by the order made at the March term of the Court, in 1844.

A sheriff to whom the estate of a decedent has been committed by the County Court, for administration is liable in a suit in chancery to distributees, (1 B. Monroe, 59,) and his securities on his official bond are responsible to those interested.

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The statutory
provision on the
subject.

The 57th section of the act above referred to, provides, that "If all the executors, named in any last will, shall refuse to undertake the executorship, or being required to give security, shall refuse to give, or be unable to procure the same, and no person will apply for administration with the will annexed; or, if no person will apply for the administration of the goods and chattels of any intestate, it shall be lawful for the Court having jurisdiction of such probate or administration, as herein before named, after the expiration of three months from the date of the death of the testator or intestate, to order the sheriff of the county to take the estate into his possession, and make sale of so much thereof, by public auction, as the payment of debts shall make necessary, or as shall be perishable, or be directed by will to be sold."

The order in question, it is urged, is unauthorized by this law, because Price Edrington had been duly appointed and qualified as administrator of Seth Cook's estate, and took upon himself its administration, and that a vacancy occurred in the office of administrator, by reason of his subsequent removal by the County Court at their April term in 1842. That the vacancy in the office of administrator in this case, was caused and created by the County Court. And that they had no right to order the sheriff to fill such vacancy, caused by the removal of an existing administrator who had applied and been appointed to administer within 3 months from the death of the intestate. That the authority of the County Court to order the sheriff to administer, only exists in cases where, from the death of the intestate, there has been no application made by any person to administer, and where a continued vacancy in the administration exists, and is occasioned for want of such application, for, and during three months, from the death of the intestate, and until the order should be made requiring the sheriff to take charge of the estate. To sustain this construction of the statute, the case of *Roop, &c. vs Rodes' adm'r.*,

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(*7 B. Monroe*, 111,) is relied upon. The question presented in this, and in that case, are not the same.— This is a direct proceeding against the sheriff and his sureties by the creditors of Cook's estate, to make them liable for a settlement and distribution thereof amongst them and the distributees, because of the order charging the said sheriff with its administration.

The question in the case referred to, was upon an order made by the Edmondson County Court, in a proceeding of the sureties against an administrator for counter security. The administrator there replied to the rule to show cause, &c., that he was neither able or willing to give the counter security required. The County Court in their order removed the administrator on the condition that his sureties, or either of them, would take and administer the estate, which they refused to do, and appealed to this Court; the order of the County Court was affirmed by this Court. In the reasoning introduced to sustain that opinion, it is incidentally suggested, that "as there was already an administrator who had given bond with approved security, the case was not such, as under the 57th section of the act (1 *Statute Laws*, 670,) authorized the Court to commit the estate to the sheriff in his official character and under the responsibilities of his official bond."

The case distinguished from the case of *Roop &c. vs Rodes adm'r*, (*7 B. Monroe* 111.)

Take this extract literally and by itself, and it would seem to mean only, that the County Court had no right to take the estate from an existing administrator, and commit it to the sheriff. But when taken in connexion with what precedes and follows, it is obvious that in the opinion it is intimated, that if an estate is left without administration by the removal of one who had upon application, been regularly qualified and appointed administrator, then in such case, the County Court would have no authority to order the sheriff to take the estate and administer it.

This view was doubtless entertained and expressed at the time, to fortify the decision of the Court upon a question different, materially, from the one involved in

The County Court may lawfully under the 57 sec. of the act of 1797,

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Stat. Law 570,)
commit to the
hands of the
sheriff the es-
tates of decedent
as well where an
administrator is
removed as
where none has
ever qualified,
and the sheriff
and his sureties
will be liable on
his official bond
to those interest-
ed in a faithful
administration of
such estate.

this case, and the subject was probably not considered with that care and deliberation then, which its magnitude and importance requires, and which, indeed, would, in all likelihood, then have been given to it, had the question, then, as now, been directly presented. It is, therefore, not admitted that in consequence of the opinion incidentally offered in the decision referred to, the question has been authoritatively settled. The 57th section of the act referred to, should receive such liberal construction as to effectuate, and not obstruct the intention with which it was framed—and it seems, that intention must have been to provide for cases of estates left unadministered, whether caused by a failure to apply for administration upon the death of the intestate, an abandonment of the administration or the removal by the County Court of an existing administrator.

The object was to provide for all cases, however they might occur, where there was no person charged with the administration of an estate, and in all such cases, if no application be made to administer by a competent person who could furnish competent security, the County Court has the right to have such estates administered through the instrumentality of its own officer, the sheriff—who with his securities in his official bond, will be bound to a faithful discharge of the duties and obligations growing out of such trust. The right to charge the sheriff with the administration of estates is in cases where *no person applies to administer*, where the office is vacant from any cause, or however such vacancy is produced, so that the appointment of the sheriff be not made until after the expiration of three months from the death of the testator intestate. It is not necessary in order to the validity of the sheriff's appointment that it should be made *only* in cases where there never had been an administrator appointed at all, or only where there had been a failure to apply for administration from the period of the testator's death until the expiration of three months. Such is not the language nor meaning of the statute. It is true that

in no case can the County Court order the sheriff to administer until three months after the testator or intestate's death has elapsed. *But after that time has elapsed, if their is an estate without an administrator, however it may happen, or have been caused, then in the language of the act, "If all the executors named refuse to undertake, &c., or if no person will apply for the administration of the goods and chattels of any intestate, it shall be lawful for the Court, &c., to appoint the sheriff."* If an estate be without an administrator, whether because one that had been appointed was removed, or because no administrator had ever been appointed at all; in either case the authority of the County Court alike exists, by virtue of the statute, to order the sheriff to act, provided no person applies to administer, and provided such order is not made until after three months from the death of the testator or intestate, has expired. This Court thus construes the 57th section of the act of 1797, and such construction, it is believed, is proper and necessary to be given in order that the obvious design and manifest intention of the law-givers should be carried into effect, as consistent with sound policy, and as best calculated for the preservation and security of estates, which as experience proves, it is necessary, often, to wrest from the possession of faithless, incompetent, and insolvent agents, and place the same for security, in the hands of the sheriffs of the counties. It is believed that the law has received the same construction which we give to it by the County Courts generally, throughout the State, and a practice has grown up in accordance with it, of placing estates of greater or lesser value in the hands of sheriffs, in all cases where vacancies occur in any way, and where other competent persons do not apply for administration.

The sheriff and his securities in this case, are therefore responsible to the creditors and distributees for the estate of Seth Cook, deceased, which came to the hands of N. E. Wright, the deputy sheriff. More

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than three months, nay, 3 years and more, had elapsed from the death of the intestate, before the sheriff, L. Scarce, was ordered by the County Court, to take charge of the estate.

If a deputy sheriff take charge of an estate committed to the sheriff, the principal and his securities are bound, as though the principal had received for it.

There was no administrator at the time, and it does not appear that any person applied to administer after Edrington's removal, and before, or at the time of the sheriff's appointment, although Lewis Scarce, the sheriff, did not himself, take charge of this estate, N. E. Wright, his deputy, did, and he and his securities are responsible for the deputies delinquency with respect to the estate.

But the decree in this case is erroneous in several particulars, for which it must be reversed :

1st. There has been no allowance or commission given to the sheriff.

2d. The sheriff appears to be credited in the decree by the sum of \$1919 50. The reason for which is not perceived, and its correctness is not made to appear by any thing stated in relation thereto, either in the decree or auditor's report.

3d. The sheriff should not have been charged with the uncollected claims in his hands as so much cash received, from any evidence furnished by the auditor's report, or otherwise in this record. The claims may be worthless and uncollectable. It is true, the decree states that the claims are collected or collectable, but there is no evidence whatever, in the case upon this subject. If the claims are uncollected, and the evidence thereof, within the possession of the sheriff or his deputy, they should be required and permitted to produce and hand them over to a receiver, and be credited by the amount. And they should not be charged as cash, against L. Scarce, unless they have been collected, or lost through negligence, or they shall fail to produce them when required.

4th. L. Scarce should not be charged with the sum of \$149 15, the balance including interest, which remained in the hands of Price Edrington, the first adminis-

trator, who had been removed; as it does not appear from the auditor's report, or any other evidence in the cause, that he is liable therefore, several of the demands set up by complainants are unsupported by any proof, except that they have been presented to the County Court and filed. For instance, the order of the County Court in respect to the claim of the complainant, W. S. Church, recites, that "he produced a record of a judgment against him, as the security of Seth Cook, deceased, which he has paid off as such security, for the sum of \$306 20, and \$20 69, costs," which is ordered to be filed. This claim is not sustained by any parol or record evidence in this case, and there is no proof that he was security of Cook, so far as appears.

It is impossible to say, whether the claim of the complainant, A. Harper, should have been allowed or not, from any evidence which appears in this record.

The County Court order in his case, recites that his demand was in the form of a decree of the Franklin Circuit Court, against B. Edrington and Seth Cook, and the order allows it, and directs it to be paid out of the estate when collected. But the amount of the claim is not stated in the order, and the record evidence of the demand is not exhibited in this case. It is true, the auditor states the claim in his report as amounting to \$643 32, principle and interest, and \$14 08 costs; but refers to no evidence or voucher from which he ascertained the existence of the claim or its amount. The counsel for Harper insists that as this claim is reported by the auditor, and as this report has been received and approved and no exceptions taken to it, it should be regarded as conclusive evidence of the justice of the claim. We do not think, under the circumstances of this case, that the defendants should be concluded by this report. It is obvious that the sheriff and his securities from their answers, rested their defence exclusively upon the legal questions presented in respect to the construction of the 57th section of the act of 1797, and upon the supposed illegality of the County Court orders

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OF
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Sheriff's to whom estates are committed, should be reasonably compensated for their services—and should be charged with all claims due the estate, unless they are shown to be unavailable—and credited by such as are unavailable, barred by limitation &c., and the shares of each distributee of the estate ascertained.

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committing the estate to the sheriffs, after the removal of Edrington, and that little or no attention was given to the preparation of their defence in respect to the amount of the assets with which they should be charged, the amount and validity of the demands set up, and in the amount disbursed by N. E. Wright in the payment of debts, &c., many of the demands set up may have been paid either by Cook in his lifetime, or by Edrington, administrator, or the sheriff, E. T. Wright, and his deputies, who had the estate near two years before it came to the hands of the deputy of L. Scarce. Some of the claims are doubtless barred by lapse of time. Upon the return of the cause, the defendants should be allowed to amend their answers if they desire to do so, and to have a full and fair settlement, so as to show truly the amount of assets, or disbursements, and of the existing demands.

The decree is irregular, if not erroneous, in directing a payment of an unascertained balance to the distributees collectively. The shares of each should be ascertained and stated, and then directed to be paid to them, severally, to the adults in person, and to the guardians of the infant distributees, upon the execution of refunding bonds. The decree in this case does not appear to conform even to the auditor's report, and defective as that is, there is no other sufficient data appearing upon which it is based.

Wherefore the decree of the Circuit Court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

M. Brown for appellants; *Harlan and Herndon* for appellants.

Burnet vs Burnet.**CHANCERY.****APPEAL FROM THE LOUISVILLE CHANCERY COURT.****Case 64.***Guardian and Ward. Jurisdiction.*

JUDGE CRENSHAW delivered the opinion of the Court.

October 10.

THIS suit was instituted in the Louisville Chancery Court, by G. W. Burnett, by his guardian and next friend, James F. Gamble, against Alexander S. Burnett, and others.

The case stated
and decreed of
the chancellor.

G. W. Burnett, the complainant, is the son of the said Alexander S. Burnett, and is the owner of a house and lott, in the town of New Albany, Indiana, conveyed to him by his grand-mother, about the year 1830. At that time, the complainant was only a few months old. His Father, as his natural guardian, took possession of it, and, since about the year, 1831, to the institution of this suit, has either occupied, or, rented it out; and, on the 17th day of February, 1848, he was, by the probate Court of the county of Floyd, Indiana, made statutory guardian of the person, and estate, of his said son.

When the complainant was only a few years old, his grand-mother brought him with her to Kentucky, under the promise that she would raise and educate him; and he has remained in this State, except a short interval, ever since; and without having any estate here, so far as the record shows, his uncle, the said James F. Gamble, was appointed his guardian by the Jefferson County Court.

The complainant alleges, that the said Alexander S. Burnett, is indebted to him in the sum of \$6000, for the rents of said lot, and prays a decree therefor. The bill was dismissed by the Court below, and the complainant has brought the case to this Court by appeal.

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The Court of Kentucky, have no authority to appoint guardians to infants, who have fathers living, unless they have property in the State.

Story, in his Conflict of Laws, page, 849, says: "There is no question whatsoever, that according to the doctrine of the common law, the rights of foreign guardians are not admitted over immovable property, situate in other countries. Those rights are deemed to be strictly territorial, and are not recognized, as having any influence upon such property in other countries, whose systems of jurisprudence embrace different regulations, and require different duties and arrangements. No one has ever supposed, that a guardian, appointed in any one State of this Union, had any right to receive the profits, or to assume the possession, of the real estate of his ward in any other State, without having received a due appointment from the proper tribunals of the State, where it is situate."

Again he says, same page: The same rule is applied by the common law to movable property, and has been fully recognized both in England and America. No foreign guardian can, *virtute officii*, exercise any rights, or powers, or functions, over, the movable property of his ward which is situated in a different State or country, from that, in which he has obtained his letters of guardianship. * * Few decisions upon the point are to be found in the English or American authorities, probably, because the principle has always been taken to be unquestionable, founded upon the close analogy of the case of foreign executors and administrators."

The general rule is that guardians are to be responsible to their wards through the action of the Courts of the State, where they are appointed.

If it were conceded, therefore, that the Jefferson County Court had authority to appoint the guardian by whom the infant sues in this case, it is clear, that he has no right to recover the rents of said lot, lying as it does, in Indiana, even had he been the only guardian. Much less, can he recover those rents and profits from the rightful guardian of that State. But, the Jefferson County Court had no authority to appoint a guardian for the complainant, his father being alive. unless he had property in this State, and it appears he has none.

Without deciding whether a state of case might not be presented in which it would be proper, upon the

application of the ward, by his next friend for the Courts of this country to take jurisdiction of a suit against a foreign guardian to recover, or secure the estate of his ward, no such case is presented by this record. Ordinarily, the Courts of the country where the appointment is made, and where the guardian resides, have jurisdiction of suits against him, and he cannot be held to account elsewhere. There is nothing in this case to show that it would be proper to make it an exception to the general rule. It is merely alleged that the father and guardian has paid very little attention to him, and that it is important he should be sent to school, and his guardian appointed in Kentucky, cannot do so, without money to pay for it. Let him return to the domicile of his father, which is his proper home, and then, if the father and guardian, fail to discharge his duty, the Courts of Indiana will, doubtless, compel him to do so. But, he appears to have no inclination to reside there, as he was once taken home by his uncle, where he remained but a short time, before he returned to Louisville.

Were it recognized as a general principle, that a ward might sue his guardian in any State in which he might be temporarily found, and there compelled to adjust and settle his accounts, it would lead to great vexation, trouble, and difficulty; but, to allow the individual funds of a foreign guardian, when he is not even found here, to be enjoined, as in this case, without any allegation, showing the slightest necessity for it, and drawing the guardian from his domicile, and the place of his appointment before a foreign tribunal, to settle his accounts, would be still worse. The Louisville Chancery Court, rightfully dismissed the bill without prejudice.

Wherefore the decree is affirmed.

Speed for appellant; *Guthrie & Tyler, and Loughborough & Ballard*, for appellees.

19m 326
88 650
12m 326
96 542

CHANCERY.

Johnston and Wife, vs Jones.**Case 65.**

APPEAL FROM THE CHRISTIAN CIRCUIT.

October, 10.

Femes covert. Vendor and vendee. Separate property of wife.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

The case stated.

ON the 14th September, 1847, the appellee Jones, sold to Mrs. Jane M. Johnston, the wife of George W. Johnston, a tract of land in Christian county, with the growing crop thereon, and all his stock and farming implements, together with various articles of household furniture, and some other personal property, at the price of seven thousand five hundred dollars. At the time the sale was made, Jones, executed to Mrs. Johnston a writing obligatory, specifying the property sold and the terms of the sale, in which it was stated that Mrs. Johnston, and her husband and Jones, the vendor, were to have the the joint use and occupancy of the farm, the dwelling house thereon, and the other property sold until the first day of January, 1848, at which time the purchaser was to have the exclusive possession. It was further stipulated that Jones was to continue the use of the hands on the place to secure the crops, and to put in during the fall, such crops of grain as Johnston, might direct. He also bound himself to make a good title to the purchaser, by a deed with a covenant of general warranty. And it was recited in the instrument of writing, that Jones had received twenty-eight hundred dollars of the purchase money, and the bond of Mrs. Johnston, for the residue payable on the first day of January, 1848. The twenty-eight hundred dollars was paid in the following manner, viz: four slaves at the price of eighteen hundred dollars, for which a bill of sale was executed in the joint names of Johnston and wife, but the name of Mrs. Johnston,

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purports to have been signed by her husband George W. Johnston. The balance of the twenty-eight hundred dollars was paid by the sale of an interest in a tract of land, which interest belonged to Mrs. Johnston, in the land assigned to her mother as dower, and for a title to which a writing was executed in the same manner in the names of Johnston and wife. Johnston and wife, were married in 1847, some few months previous to the time, when they entered into the aforesaid contract with Jones. At the time of the marriage, Mrs. Jones was the owner of a considerable property consisting mostly of slaves. The payment of the twenty-eight hundred dollars was made with her property. The purchase was made in her name, although her husband appears to have executed the writings jointly with her. The sale was made to the wife, because the husband had no property of his own; and it seemed to be contemplated by the parties, that the purchase money was to be paid by her, and the property purchased was to belong to, and be held by her, in the same manner that she held her other property.

Shortly after the sale was made, Johnston and wife entered upon the premises, and the parties had the joint use and occupancy of the property sold, according to the terms of the written agreement. In December following, and previous to the time, that Johnston and wife were to have the full possession of the property, the dwelling house, and some of the household furniture embraced in the sale, were destroyed by fire. A controversy then arose between the parties as to which of them should sustain the loss occasioned by the fire; and finally Johnston and wife refused to execute the contract, and brought a suit against Jones for the slaves that had been sold and delivered to him in part payment of the price of the land, and the other property purchased by Mrs. Johnston.

This suit in chancery was brought by Jones to enforce a specific execution of the contract, and on an

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amended bill in which he alleged that an action of detinue had been brought against him by Johnston and wife for the four slaves; he obtained an injunction to restrain them from the further prosecution of that suit.

A specific execution of the contract was resisted by Johnston and wife in their answer, mainly on two grounds:

1st. That as the dwelling house had been burned down, Jones was unable to deliver full possession of the property purchased by Mrs. Johnston on the first day of January, 1848, according to the terms of his contract with her, and consequently she was under no obligations to perform the contract upon her part.

2d. That being a married woman when the contract was made, it was not obligatory upon her, and could not be enforced by the chancellor.

As it respects the first ground relied upon, the property after the sale, belonged in equity to the purchaser, who having been put into the possession of it in conjunction with the vendor, had to risk such injuries as might result from mere casualties, unless such risk had been guarded against by an express stipulation in the contract. The only stipulation in the contract relied upon as having such an effect, is, that full possession of the property was to be given to the purchaser, on the first day of January, 1842. There was no agreement upon the part of the vendor to deliver the possession of the premises in the same condition they were at the time of the sale. He did not insure the property against damage from fire or other casualties, nor does the law impose upon him any such liability. The safety of property both real and personal, is at the risk of the owner, and the purchaser of real property by executory contract, is the equitable owner of it, and has to sustain any accidental loss that may occur after his purchase, and before the conveyance of the legal title; and on the other hand, he will be entitled to any benefit which may accrue to the estate in the interim; (*Sugden on vendors*, 174. 2 *Pow. on contracts*, 61.) *Paine vs Miller*, (6 *Ves. Jun.*, 349.)

The position assumed by defendants below.

A purchaser of property by executory contract, let into possession is bound to risk such injuries as result from casualties unless such risk has been guarded against by express contract, and is entitled to any benefit which may accrue to the estate in the interim, (*Sugden on vendors*, 174, 2 *Powell on contracts*, 61, 6 *vez* 349.)

But the second ground relied upon, is of a more formidable character. The general doctrine is, that a married woman cannot enter into any valid or binding contract. She may execute a deed of conveyance, and transfer the title to her property in the mode designated by law, but this forms an exception to the general rule. She is in equity, in some respects regarded as a *feme sole*, in relation to the management and disposition of her separate estate, when she has any, and this is another exception to the general rule; upon the same subject. All the property belonging to the wife, is not however, regarded in law as her separate estate. Estate of the latter description is, entirely of an equitable nature, the legal title to which is vested in a trustee, either by the instrument which creates the estate, or by operation of law, and the use alone with a power of disposition is vested in the wife, subject to her separate control.

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The general doctrine is that a feme covert cannot make a valid or boundary contract—there are some exceptions.

The property owned by Mrs. Johnston, is not separate property; it belonged to her, absolutely, at the time of her marriage, and as the law was, prior to the passage of the act of February, 1846. (*Sess, acts 1845-6, page 42,*) the title to the slaves, would have vested absolutely in her husband. But as she was married after the passage of that act, her slaves are to be regarded as real estate, and can only be disposed of by deed in the same manner, that husband and wife, may dispose of the lands of the wife. The act enables her to make one description of contract, which is valid and binding, that is, a contract in writing executed jointly with her husband, to pay for necessaries furnished her, or any member of her family. In all other respects, her contracts stand as they did before the passage of that act; those that were previously invalid still remain so, and cannot be enforced either in a Court of law or in chancery.

Since the statute of 1846, (*sess. acts 1845, 6 page 41,*) slaves the property of the wife are regarded as real estate, (and do not vest absolutely in the husband as before the statute,) and can only be disposed of by deed in the same manner as real estate—unless it be by written contract executed jointly, with the husband to pay for necessaries for a member of the family.

She cannot make an executory contract, either for the purchase or the sale of lands that will be obligatory upon her. She cannot sell or dispose of her slaves, ex-

A feme covert, cannot make an executory contract either for the purchase or

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sale of lands—
nor sell her
slaves except,
as authorized by
law, except in
relation to her
separate estate.

cept in the manner authorized by law ; which must be by deed executed by her, and her husband, and acknowledged before the proper officer, in conformity with the requisitions of the law, in reference to the conveyance of the lands of the wife. In relation to her estate, she is not placed in a Court of equity, upon the same footing of a married woman, who is the owner of separate property. She has not the same power over her property, that a married woman has over her separate estate. She can make no disposition of it unless it be done in conjunction with her husband, and then only in the mode pointed out by law ; but in the case of separate estate, the wife can act in her own name alone, independently of her husband, and can make contracts within the scope of her power over the property, which will be obligatory upon her, and which the chancellor will enforce.

Mrs. Johnston, had no separate estate properly so denominated. Being a married woman, the contract she made with Jones, is not binding upon her. The transfer of her slaves, in the manner in which the instrument was executed is invalid. The bond for the purchase money cannot be enforced against her, nor can her estate be rendered liable for its payment. It follows according to these principles, that the decree of the Court below, executing the contract specifically, and subjecting her estate to the payment of the residue of the purchase money, is erroneous.

We have not regarded the estate belonging to Mrs. Johnston, as separate estate, nor do we think we would be authorized to do so, from any thing contained in the record.

It has indeed been argued, that such a conclusion, is not only authorized, but required by the state of the pleadings. The complainant alleged in his original bill, that the defendants had, before their intermarriage, entered into a written contract, by which the property of the wife was secured to her, as her separate estate, and the power conferred on her to deal with, and

dispose of it after marriage at her discretion; and that the defendants at the time of the sale, had both represented to the complainant, that a contract to that effect had been entered into by them. The defendants in their answer deny positively these allegations, but their denial is made by following the language of the bill, and denying the truth of the statement as therein made. This, it is contended, is only a literal, and not a substantial traverse of the allegations of the bill, and that consequently this part of the bill should be taken as true. If the defendants answer contained no other, but a general denial of the truth of the allegations, as they were made in the bill, its sufficiency might be questionable, but it contains the additional denial that the wife has any separate estate secured to her by any contract, devise, bequest or settlement, so that the denial is comprehensive enough to cover the whole ground, and to meet and contradict fully, an averment that she has a separate estate, created by a contract made at any time or in any manner.

Although Jones the vendor cannot have a specific execution of the contract decreed against the wife, he can, however, against the husband if he elect to do so. The husband was a party to the contract and executed in the joint names of himself and wife, a note for the payment of the purchase money; and with his assent it was agreed that the deed should be made to the wife, and a writing to that effect was executed by the vendor. So far as he is concerned, the vendor has a right to a specific execution of the contract. The length of possession established by the proof is sufficient evidence of title, and the vendor has manifested a desire to comply with the contract, from the time it was executed; so that the only obstacle to its execution according to the original intention of the parties, consists in the inability of the wife to make such a contract; and as that obstacle does not release the husband from his responsibility, he is still bound by the agreement.

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The husband was a party to a contract for land made in the joint names of himself and wife, and executed notes in their joint names, and agreed that the title should be made to the wife and received a writing to that effect from the vendor—he held that the husband could be compelled specifically to execute the contract.

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If the complainant should elect to have a specific execution of the contract against the husband, the latter will be liable for all the purchase money, and the credit entered upon the note for its payment, must be disregarded, unless the husband had the power to transfer to the vendor the slaves and land of his wife, or some interest in them, for which the credit was allowed.

The first section of the act of 1846, already referred to, provides expressly that the slaves which a married woman may have at the time of her marriage, shall not be liable to the debts of her husband. If he can by his act render them liable for the payment of his debts, or the satisfaction of his contracts, this provision of the statute will be measurably defeated. The obvious intention of the Legislature in the passage of the law in question, was to secure to the wife during her life, the enjoyment of the land and slaves that belonged to her at the time of her marriage. To accomplish that object, it was declared that they should not be liable to the debts of the husband, and the mode in which they might be sold or disposed of, or rendered liable for debts created jointly by the husband and wife, was pointed out and prescribed in the statute. The rational deduction is, that the Legislature did not intend that the husband should have any power to dispose of the property or any interest in it, except in the manner specified. This conclusion is fortified by the consideration that a construction of the act, by which the husband is still deemed to be invested with the power to sell a life estate in the slaves and an interest in the land, in the lifetime of the wife, would in a great degree frustrate the design of the Legislature, which was evidently to protect her property from her husband's creditors, and his acts; and to secure to her the use of it during her life, unless she assented to its disposition in the manner prescribed by the statute. When, as in the enactment of this law, the intention of the law-makers is manifest, and unambiguous; such an exposition should be given to the statute as will not

The husband since the act of 1846, (sess acts 1845-6, page 42,) cannot make any contract which will bind the slaves of the wife, except made in conjunction with the wife for necessities as provided by that act.

only harmonize with, but promote and secure the end and purpose intended to be accomplished by it. Such an exposition as deprives the husband of all power to sell or dispose of the property of the wife, except in the mode prescribed by the statute, is consistent with both its letter and spirit, as well as promotive of its object and design, and is the one that must prevail. The consequence of this construction of the statute is, that the vendor acquired no interest in the slaves or land of the wife by the writings executed by the husband in their joint names, and for which a credit was entered on the note for the payment of the purchase money.

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The Court therefore erred in perpetuating the injunction against the prosecution of the action of detinue, brought in the names of the husband and wife, for a recovery of the slaves of the wife in the possession of the vendor, as well as in rendering a decree by which the wife was required to convey the title to them, and also her interest in the dower land of her mother, to the complainant, by a deed executed in the manner required by law to pass the title of *femes covert* in land and slaves.

Wherefore the decree is reversed, and cause remanded with directions to dissolve the complainant's injunction, and to dismiss his bill against the wife, but to render a decree for a specific execution of the contract against the husband, if the complainant elect to have it specifically executed against him; in which event the land will be liable and may be sold for the payment of the purchase money, and if it be insufficient for that purpose, a decree may be rendered against the defendant for the balance. Or the complainant may have a rescission of the contract, if he decline, a specific execution against the husband alone, when it will become necessary for the Court to refer the case to a commissioner, and to make such orders and decrees as may be necessary for the settlement of it according to equitable principles. But if a rescision be decreed, the husband alone will be responsible for the balance due, if

When the husband sells the slaves of the wife, (the marriage taking place since the act of 1846.) They may be recovered back by action of detinue.

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any, upon the adjustment of the matters between the parties.

McLarning and Monroe for appellants; *Morehead & Reed* for appellee.

Clay vs Sandefer.

TRESPASS.

APPEAL FROM THE HENDERSON CIRCUIT.

Case 64.

Trespasses, joint and several. Practice.

October 10.

JUDGE HISE delivered the opinion of the Court.

The case stated
and pleadings.

THOMAS SANDEFER sued in trespass, Barnett M. Clay and Joel S. Lambert for forcibly taking a flat-boat and its loading, composed of Hogs, Corn, and Cattle, on the Ohio river, which belonged to the plaintiff. The defendants jointly plead not guilty, and Lambert also pleads not guilty in a several plea, and the parties go into trial upon the agreement that their evidence should not be restrained, but might extend to any matter which could have been specially pleaded.

The substance
of the proof of
plaintiff.

The plaintiffs evidence established the following state of fact: That some short time before its seizure by Lamburt, John Williams had sold and delivered the boat and part of the cargo to the plaintiff, who there-upon put on board some more corn, hogs, and several head of cattle, to increase the cargo. That Williams and Scott, the first as a hand, the other as pilot, were employed by the plaintiff to assist in navigating the boat down the river. That whilst the boat was in their charge on the Ohio river and near the Indiana shore, the defendant Lambert, boarded, in company with A. B. Clay, a son of the defendant B. M. Clay and took

possession of her and the entire cargo, and prohibited the plaintiff and his hands from interfering with the boat or any part of the cargo, alleging that he had an attachment against her. The boat was brought to the Kentucky shore and left in charge of a Mr. Hall. Some time afterwards a part of the corn was thrown out on the shore—the boat had sunk in the river—and some of the cattle were seen running at large on the Indiana shore, and the witnesses do not know what become of the hogs and the corn. The value of the boat and cargo was proven. It is proven that the defendant B. M. Clay, though not present when the seizure was made, afterwards said that Williams owed him and he had sued out an attachment against the boat and cargo. That he had ordered the attachment to be sued out to make his money out of the boat and the property on board. That he believed the boat and part of the cargo belonged to Williams. The son of the defendant B. M. Clay, was along with Lambert, at the time the seizure was made.

After the plaintiff's evidence, to the effect as above stated, was closed, the counsel for the defendant Clay, moved the Court to instruct the jury to find for him, as in case of non-suit. Which motion was overruled. To which opinion of the Court, Clay's counsel excepted. The plaintiff's evidence was written out, certified, and incorporated in his bill of exceptions.

Motion to instruct us in case of non suit, overruled and exception.

The defendants then read as evidence to the jury, the copy of a record consisting of a bill in chancery filed by Barnett M. Clay in the Henderson Circuit Court, against John Williams and Thos. Sandefer, with the exhibits referred to, therein, the order of two justices, directing the clerk upon the execution of bond, &c., to issue an attachment, &c. The attachment was issued, and the return made thereupon by Joel L. Lambert, as D. S., for H. Alves, S. H. C.

Defendants evidence.

The bill charges that John Williams was indebted to Clay, the defendant in this suit, in the sum of \$155 50. That he was insolvent and owned no property except

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one half of a flat boat, then lying at said Williams' landing, and one half the cargo thereof, consisting of corn and hogs; that he, Williams, was about to remove, belonged to Thos. Sandefer, and asks for an attachment to be issued directing the sheriff to seize and take the flat boat, and one half of the hogs and corn on board. The order of the justices directs the clerk, upon the execution of the bond to John Williams, only to issue an attachment to the sheriff, authorizing him to seize and take the flat boat and one half the corn and hogs on board, in accordance with the prayer of the bill. The attachment issued by the clerk accordingly, directs the sheriff to take into his possession, the flat boat then lying in the Ohio river at said Williams' landing, and one half of the corn and hogs on board, reciting that the other half of the boat and cargo belonged to Thos. Sandefer, (the present plaintiff,) and to hold the same subject to the order of the Court, but to deliver it to Williams upon his executing an appropriate bond, &c. Upon which, is the following return:

"Executed and levied, August 1st, 1843, on the property described in the within attachment, and the within named John Williams failing to give bond as the process requires, I held on to it."

This return is signed by Joel L. Lambert as D. S., for H. Alves. S., of H. C.

The only other evidence introduced by the defendants, was the deposition of John Williams, who proved that he had for a valuable consideration, sold and delivered the flat boat and such part of the cargo of corn and hogs as belonged to him, to the plaintiff Sandefer, several days before Clay's attachment was issued, and before his bill was filed. That afterwards the plaintiff, before the boat was taken, had increased the cargo by putting on the boat six other hogs, three head of cattle, and about 81 barrels of corn, and that the boat and cargo when taken by Lambert and Clay, was worth about \$300; and Lambert forbid plaintiff interfering with the boat or cargo in any manner whatever.

After the testimony was closed and the cause argued, as the jury were about to retire, the counsel of defendant Clay moved the Court that they should have leave to take with them for examination the evidence of the plaintiff, as written down, certified, and inserted in the exception taken to the opinion of the Court overruling his motion for a non-suit. But the Court refused the leave asked; and to this opinion of the Court, Clay's counsel excepted.

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Motion of defendant to permit the jury to take a bill of exceptions, containing plaintiff's evidence written out.

The jury returned their verdict for the plaintiff, and assessed the damages at \$500; for which sum, and the costs of suit, the Court rendered judgment.

Verdict & judgment for plaintiff.

The defendant's counsel then moved the Court to set aside the verdict and judgment, and grant a new trial upon the following grounds:

1st. That the verdict of the jury should not have been joint, but several.

2d. That the Court erred in granting plaintiff's and refusing some of defendant's instructions to the jury.

3d. That the Court erred in refusing to instruct the jury to find for defendant, B. M. Clay, as in case of a non-suit.

4th. The damages assessed by the jury were excessive.

5th. The joint verdict of the jury against both defendants was contrary to law, and not supported by the proof in the cause.

6th. The Court erred in refusing the leave, as asked, for the jury to take with them, on retiring, the exception marked B, containing the plaintiff's proof.

All the reasons offered by defendants for a new trial, nine in number, are comprised within the above classification.

The motion for a new trial was overruled, and the defendants have appealed to this Court.

The application for a new trial should not have been refused—the joint verdict of the jury is not sustained by the proof in the cause. The defendant Lambert was clearly justifiable in taking the flat boat, and one

Motion for new trial overruled.

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A process of attachment regularly issued by competent authority, is a justification to an officer levying the same on the property of defendant, but not of other persons.

half the cargo on board, because he was so expressly commanded by valid process regularly issued by competent authority then in his hands to be executed. But it appears from the proof that he took the whole of the cargo, and not the half only, as directed by the attachment in his hands, and said to the persons on board that the plaintiff must not interfere with it; that he left the boat at the shore, where it was, through inattention, permitted to sink, the hogs and cattle to disperse, and the corn to be destroyed. He was liable, therefore, as a trespasser, for taking more of the cargo by one-half than he was directed to take by the attachment. But for this, he alone was liable, for he alone committed the trespass; for the attachment sued out by the defendant Clay did not authorize him to levy on but half the cargo, and there was no proof in the cause that Clay directed Lambert verbally to take more than he was directed by the attachment to take; nor was there any satisfactory proof that Clay assented to the trespass committed by Lambert; Clay, therefore, could not be made jointly liable with Lambert for his, Lambert's, wrongful conduct and trespass in taking more property than he was authorized to take, for the most obvious reason, that Clay did not, either by the attachment which he procured to be issued, or otherwise, in any manner direct or authorize Lambert to commit the trespass.

It was erroneous, therefore, that Clay should be made responsible for the trespass of the sheriff; and if so, it was equally erroneous that Lambert, the sheriff, should be made responsible in a joint action for the trespass committed by Clay in procuring an attachment to be issued directing the property (the boat and half its cargo) of the plaintiff in this action, to be seized and taken to satisfy Clay's demands against John Williams. Sandefer's property, to the extent of the boat and half its cargo, was directed and procured to be taken by Clay, by virtue of the attachment, which justified the sheriff to that extent alone; but which did not justify Clay. Clay alone, is therefore guilty of the trespass to

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the extent only which he, by the attachment, authorized the plaintiff's property to be taken to pay Williams's debt to him. And it was erroneous to find a joint verdict and render a joint judgment against *Lambert* and *Clay* both, by which *Lambert* is made responsible for his own several trespasses as well as for the trespasses committed by *Clay* alone, in which he had no participation, and by which *Clay* is made to pay damages for his own trespass, in authorizing by his attachment, the boat and half the cargo of the plaintiff to be seized, and also for the trespass committed by *Lambert*, in taking property which *Clay's* attachment did not authorize him to take, and in which *Clay* did not participate; although, to all appearance, the tortious acts of the sheriff and *Clay* seemed to be closely connected, yet in fact they amount to several and distinct trespasses for which a joint verdict and judgment cannot be given. *Clay's* trespass consists in his directing, by his attachment, the plaintiff's boat and half the cargo to be taken to pay another man's debt. *Lambert's* trespass consists, not in taking the boat and half the cargo, for the attachment justified that much, but in taking the whole cargo instead of half.

It is the opinion, therefore, of this Court, upon the state of fact as presented in the record, that, neither of the defendants being responsible for the other's trespass, a joint recovery cannot be had against both. Cases frequently occur where the person who procures process to be issued, or the person who, without lawful authority, does actually issue it, may be held responsible as trespassers for so doing; although such process will furnish a good legal excuse to the officer who executes it; and so on the other hand, a party may lawfully issue, or cause to be issued, process which will furnish no justification to the officer who executes it, where it is abused or misapplied by him. See the case of *Rodman vs Harcourt and Carrico*, 4 B. Monroe, 231, and cases there cited.

The instructions given for the plaintiff, numbered 2,

A plaintiff or complainant, in an attachment case is not liable jointly with the officer who goes beyond his authority, in bringing an attachment, unless he directs or sanctions the act of the officer—nor is an officer liable jointly with a plaintiff who improperly sues out an attachment, or directing its levy upon property of a third person.

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3, 5, 6, 7, being inconsistent with the law of the case, as indicated in this opinion, were erroneous or unauthorized by the facts of this case. They all assume that there may be a joint recovery against the defendants, who, the proof shows, were guilty only, *if at all*, of several and distinct trespasses.

The 1st, 2d and 4th instructions given for defendants were erroneous, and should have been refused. They instruct the jury, in substance, that if the sheriff had a valid attachment in his hands, it would excuse Lambert for seizing more property than the writ directed; and that in such case, Clay was not responsible for having the plaintiff's property seized to pay another man's debt to him, provided he done nothing more in the matter than to procure to be issued the attachment by which it was directed to be done.

The 3d instruction for defendant was properly given, and the 5th properly refused.

Wherefore, the judgment is reversed, and the cause remanded, that a new trial and further proceedings may be had in conformity with this opinion.

Herndon and Harlan for appellant; *B. Monroe* for appellee.

CHANCERY.

Bank of Kentucky vs Milton et al.

ERROR TO THE FAYETTE CIRCUIT.

Case 64.

Mortgage, equity of redemption. Practice in Chancery.

October, 10.

JUDGE HISE delivered the opinion of the Court.

Case stated.

THE BANK OF KENTUCKY in this case is seeking, by way of substitution, to reach certain slaves and other

property which had been conveyed by deed of mortgage by W. E. Milton to Eben and John Milton, to secure and indemnify them and Young and Milton, as well as various other parties, on account of their existing liabilities as his sureties in various debts due the Bank of Kentucky, and to the Northern Bank, and on other accounts.

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vs
MILTON ET AL.

The Bank of Kentucky, as creditor of the mortgagor, holding three notes of 300 dollars each on him, with Young and Milton as his securities, claim to be substituted in the place of the said sureties Young and Milton, who are beneficiaries in said mortgage, on the ground that the notes exhibited are the remains of three of the debts named in the mortgage, reduced to their present amounts by payments and renewals.

The equity of redemption of the mortgagor in the slaves mentioned in the mortgage had been previously sold under executions against him, issued upon judgments for debts secured by the mortgage, and Eben Milton, one of the mortgagees, purchased the slaves at a full price, satisfying the executions. He then sold the said slaves to John Milton, his co-mortgagee, for a valuable consideration, who sold and passed the title of said slaves by bill of sale dated August 1, 1842, to C. B. Richardson, as trustee in trust for the sole use and benefit of Elizabeth Milton and her heirs forever.

When the equity of redemption on property mortgaged is sold to satisfy debts secured by the mortgage, & the same is purchased by one of the mortgagees, at full price, and debt paid, and the other mortgagees release them, nothing remains which can be subjected in that property to the creditors of the mortgagor.

Both Eben and John Milton, the mortgagees, executed a formal deed of release, dated February 21, 1844, reciting that heretofore, in the manner stated above, the title to said slaves had passed to C. G. Richardson, in trust, &c., and releasing all claim as mortgagees, and confirming the previous sales of said slaves.

So that the entire interest in said slaves has passed to Richardson, as trustee. The equity of redemption, by virtue of the sale and purchase by Eben Milton of William Milton's equity of redemption under execution for demands secured by the mortgage, and the legal title by virtue of the bill of sale from John Milton, and the subsequent deed of confirmation and release executed

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TUCKY
vs
MILTON ET AL.

A bill should not be dismissed absolutely where it is prematurely heard, but without prejudice to another suit.

by both the mortgagees; so that, were it conceded that the Bank was entitled to be substituted in the place of Young and Milton, the sureties of the mortgagor, in the notes exhibited, neither Young and Milton nor the Bank have now any lien, by virtue of the mortgage, on the slaves.

The case was brought to a hearing and the decree rendered prematurely; but after the case had been submitted by complainant, the allegations of complainant's bill were not traversed for the non-resident defendants, and there was no guardian *ad litem* appointed to answer and defend for the infant children of Elizabeth Milton. Besides the slaves, the mortgage embraced all the notes, dues and book accounts, and household and kitchen furniture of the mortgagor, W. E. Milton.

It does not appear whether the complainant may not be able to realize something out of the other means and property described in the mortgage, and if the Bank should be disposed to set out hereafter upon an exploring expedition after the notes and accounts and the household and kitchen furniture of the mortgagor, why no insurmountable obstruction should be interposed by the decree, which dismissed the complainant's bill absolutely.

Wherefore, the decree of the Circuit Court is reversed, and the cause remanded, that the Circuit Court may dismiss the complainant's bill without prejudice.

Robertson for plaintiffs; *Robinson and Johnson* for defendants.

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vs
PAYNE.

Withers vs Payne.

APPEAL FROM THE PENDLETON CIRCUIT.

Ejectment.

JUDGE HISE delivered the opinion of the Court.

THIS is an action of ejectment, instituted in the Harrison Circuit Court in March, 1848. On the several demises in the declaration in the names of William A. Withers and the heirs of Napoleon B. Coleman, deceased, as lessors of the plaintiff. At the September term, 1849, of the Pendleton Circuit Court, to which the case had been removed, James Curtis, the husband of Drucilla Curtis, formerly Coleman, and one of the heirs of N. B. Coleman, deceased, for himself, and as agent of the said heirs, filed his affidavit, stating that his and the other names of the said heirs were inserted in the declaration as lessors of the plaintiff, without their knowledge or consent, and wholly without authority, and they move to have their names expunged and struck from the declaration; whereupon the Court, upon the failure of W. A. Withers to make a sufficient or satisfactory response to a rule to show by what authority their names were used by him, ordered them to be stricken out of the declaration, and that the suit should be no further prosecuted in the names of the heirs of N. B. Coleman. The suit progressed thereafter in the name of W. A. Withers, as the sole lessor of the plaintiff, and at the March term, 1850, of the Pendleton Circuit Court the suit was tried, and there was a verdict found and judgment rendered in favor of the defendant. The plaintiff, whose motion for a new trial was overruled, has appealed to this Court.

The plaintiff claims under a patent from the Commonwealth of Virginia to David Jameson for 5000 acres of land dated the 9th of May, 1792. The last

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judgment of the
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link in his chain of title is a deed of conveyance from Jesse Henry, deputy sheriff of Harrison county, to William A. Withers, dated on the 16th of April, 1845. In the preamble to this deed it is recited, that in virtue of a certain execution, (therein described,) "He levied the same on all the *unsold land* within the patent claim of David Jameson's 5000 acres, supposed to be one thousand one hundred acres more or less," as the property of the defendants in the execution, who were the heirs of N. B. Coleman, deceased, and which had descended to them from their ancestor; that W. A. Withers became the purchaser thereof for \$20; in consideration whereof, he conveys to said Withers "all that tract or parcel of land lying *within* the patent claim of David Jameson for 5000 acres of land situated in Harrison county, in the State aforesaid, to which N. B. Coleman, at the time of his death, was entitled, supposed to be 1100 acres."

Unless the plaintiff has shown title to the land in controversy, which was occupied and claimed by defendant by virtue of this deed, his action could not be maintained, and the verdict of the jury and judgment of the Court was properly given against him.

The execution described in the deed of the deputy sheriff, was on the 16th September, 1837, "levied on 1100 acres of land in Harrison county, to be sold October 9th, 1837." No other description is given of the land levied on, than that in quantity it was just *one thousand one hundred acres*, and that as to its location, *it lay in the county of Harrison*.

The sheriff further returns on said execution that he "sold, and Joshua Bean became the purchaser of, 449 acres of land, and failed to comply with the conditions of sale, and levied *again*, to be sold November Court, October 24, 1837."

Again the sheriff returns on said execution, "that he sold, agreeable to advertisement, and Wm. A. Withers became the purchaser of, all the land for \$20. No

property found, to make the balance. November 18th, 1837."

If it be granted that the levy in this instance is sufficient, and not void for uncertainty, yet it must follow that the sheriff could not, and as it must be presumed, did not, sell to Withers more land in quantity than 1100 acres. The quantity of land being 1100 acres, and its location in Harrison county, as stated in the officer's return of his levy, is all the description which is given, by which to identify the land levied upon; so that Withers was only entitled, by the sale and purchase, as the same is reported by the officer's return thereof, indorsed upon the execution, to 1100 acres of land in Harrison county. If the number of acres, as stated in the return made of the levy, is to be regarded as merely descriptive of the particular tract of land levied upon and sold, and as tending to supply sufficiently the entire absence of any other kind of description, such as might be given by stating in the return in whose name it had been entered, surveyed or patented, or to whom it had been conveyed; yet it must be taken that the sheriff sold, and Withers bought, either a tract of land in Harrison county, so denominated as an 1100 acres survey in some deed, patent, entry, or survey; or otherwise, that he sold, and Withers purchased, precisely 1100 acres out of some larger tract of land. And waiving the question as to whether such levy, sale, and sheriff's conveyance in pursuance thereof, would or would not be void on the ground of uncertainty as to what particular land was sold; and waiving the question as to whether the sheriff's deed in this case is or is not null and void, on the grounds that a sheriff has no right to sell any other or more land than that he has levied upon, or that he has no right to convey to the purchaser any other or more land than that which was actually sold and purchased, or because the land described in the deed does not appear to be the same land purchased at the sale or levied on by the sheriff; let it be assumed that the land levied upon, and purchased

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A return by sheriff, upon an execution levied on all the unsold land, within the patent of David Jameson, 5000 acres, supposed to be 1100 acres more or less, and a sale and conveyance, "of all that tract or parcel of land lying within the patent claim of David Jameson for 5000 acres of land situated in Harrison county in the State aforesaid, to which N. B. Coleman, at the time of his death was entitled, supposed to be 1100 acres," is not such description, as will authorize a recovery in ejectment without farther identification, & proof of what was sold, and the position of the 1100, and the remaining 3800 acres, constituting the 5000 acre tract.

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by Withers at the sheriff's sale, is the same land described in the sheriff's deed, although, that it is the same, cannot be ascertained from the sheriff's returns of said levy and sale, yet it is manifest the sale and conveyance was only for *one thousand one hundred acres* of land, (and as appears only from the deed for the first time) *lying within* a survey of land patented to David Jameson for *five thousand acres*. Now as neither the levy, sale or conveyance gives any sort of description, by metes or bounds, of the 1100 acres of land lying *within* Jameson's patent, or by stating whether it lies on the north or south end, or the east or west side of said 5000 acre survey, and as it is apparent, from the conveyance itself, that the land conveyed was only the *unsold land* within Jameson's patent, supposed to be 1100 acres, and the title to which remained in N. B. Coleman at his death, how, in the absence of any proof whatever, can it be assumed or known that the land in contest, and in possession of the defendant, (though it be admitted that it is embraced within the limits of Jameson's 5000 acre survey,) is embraced within the plaintiff's claim, and not embraced within that part of said survey consisting of 3900 acres which had been sold off before Coleman's death? The *unsold land* remaining in D. Jameson's survey, after N. B. Coleman's death, is assumed in the deed to be 1100 acres, more or less. The quantity that had been previously sold off, therefore, must have been about 3900 acres.

Where a conveyance is of all the unsold land in a particular tract, and ejectment is brought, plaintiff claiming under such a conveyance. It is incumbent upon him, to show that the land claimed, was not previously sold: (6 Litt. 2, 81, 8 A. K. Marshall 20.)

Now, it was incumbent on the plaintiff, in order to give location to the 1100 acres conveyed to him, to show by proof the position within the survey of the 3900 acres which had been sold off in Coleman's lifetime. That at least that much of the survey had been sold and conveyed to others in Coleman's lifetime is manifest, and the plaintiff could not deny it because, 1st. But 1100 acres of land was levied upon by the sheriff. 2d. Because plaintiff bought but 1100 acres of land at the sheriff's sale, and the sheriff had no

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right to convey him any more. 3d. Because the sheriff's deed to Withers is for 1100 acres, more or less, out of Jameson's 5000 acre survey, (if for more, it is void as to the excess, at least,) assuming and explaining therein that the residue thereof 3900 acres had been previously, in N. B. Coleman's lifetime, sold off. Now, the defendant's claim and possession may be embraced not within the plaintiff's 1100 acres of unsold land, but within the limits of the parcel or parcels of said survey which had been sold off by Coleman, in his lifetime, or by others previous to his death. There was no proof introduced, of any sort, showing the position of that part of the 5000 acre survey reserved by the sheriff's deed; consequently it could not be known in what part or where therein the 1100 acres should be, or was located; and of course it was not shown, and did not appear, that the plaintiff's claim embraced the land in dispute, or that the same was not in fact included within the specified reservation.

The case of *Madison's heirs vs Owens*, 6 Littell's Select Cases, 281, and the case of *Taylor, &c. vs Taylor, &c.*, 3 A. K. Mar. 20, are referred to, as sustaining the views taken by the Court with respect to the question here presented. The result would not have been more favorable to the plaintiff, had he been allowed to retain the names of N. B. Coleman's heirs, in the demise, as lessors of the nominal plaintiff, because Coleman's heirs, to show title, would have to rely on the deed from Thomas Triplett to their ancestor N. B. Coleman, which conveys only such portion of the land in David Jameson's 5000 acre survey as remained after excluding such parts as said Coleman had previously sold as said Triplett's agent; so that under this conveyance, upon the proof as presented in the record, the same obstacles would have prevented a recovery on the demise of Coleman's heirs.

Several other interesting and important questions are presented in the instructions, and upon the facts exhibited in the record, which will not be now considered,

BATTERTON & C. as upon the ground already noticed, the judgment of
vs
CHILES. the Circuit Court is affirmed.

Wall and Withers for appellant; *Payne, Harlan and Trimble* for defendant.

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CHANCERY.

Batterton &c., vs Chiles.

Case 66.

ERROR TO THE BOURBON CIRCUIT.

Limitation. Practice. Partition.

October, 13.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

**Case stated and
decreed of the
Circuit Court.**

THOMAS D. CHILES, brought this suit in chancery to have a partition of some land within the boundary of **William Hoys** patent of fourteen hundred acres. He claims under **Hoys** heirs five-sevenths of the land formerly owned by **John Evalt**, and which was sold and conveyed by the latter to **James Trabue**; and also five-sevenths of the land conveyed by an individual by the name of **Jones**, to **Nicholas Smiths sen.** He asserts title to some other land within the aforesaid patent boundary; but as a Court of Chancery, has no jurisdiction, upon the matters set forth in the bill, except for the purpose of decreeing a partition, it is unnecessary to advert to any part of his claim, but that already alluded to, which embraces the two pieces of land above mentioned.

The Court decreed a partition, giving to **Chiles** five-sevenths of both of said pieces of land. From that decree the defendants have appealed, and deny his right to any part of the land claimed by him.

It appears that **William Chiles**, as early as the year

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1821, by virtue of a decree in a suit in Chancery in the Bourbon Circuit Court, which he had previously instituted, against the heirs of William Hoy, obtained a deed of conveyance for seven hundred acres, of the land included in Hoy's patent, and became thereby invested with the title of Hoy's heirs to that part of the land. He was subsequently required by a decree of the Circuit Court of the United States, for the district of Kentucky, to convey to the heirs of Thomas Boone, all the land conveyed to him by said commissioner, and under the last mentioned decree, and in execution thereof, a deed was made by a commissioner, conveying not only the interest of William Chiles, in the seven hundred acres, but also in the residue of the fourteen hundred acres. The deed however, was effectual only so far as it was authorized by the decree. To that extent it was valid, notwithstanding it purported to convey to the heirs of Thomas Boone, other land besides that which the commissioners had power to convey, by virtue of the decree. Boon's heirs also obtained a decree, and a conveyance in pursuance thereof, for the same seven hundred acres of land, in the Bourbon Circuit Court, in which suit William Chiles, and the heirs of William Hoy, were defendants. By these proceedings, William Chiles, and Hoy's heirs, were divested of all title to the seven hundred acres of land, and every part thereof. And as Thomas D. Chiles, the complainant asserts claim to the land in controversy, by virtue of a title derived from William Chiles, and Hoy's heirs, since the institution of the aforesaid suits, by the heirs of Thomas Boone, it is obvious that he has no available title to any of the land within the boundary of the seven hundred acres. For if he procured any part of his title, before the final decrees in the suits brought by Boon's heirs, he is bound by those decrees, as a purchaser *pendente lite*, and so far as he obtained deeds from any of the parties subsequent to the date of the commissioners deeds, no title passed thereby, to any part of the seven hundred acres.

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The decree of the Court below is therefore erroneous so far as the lands formerly belonging to Evalt and Jones are included within the boundary of the seven hundred acres. But as some part of both the tracts seems to lie outside of the seven hundred acres, and inside of Hoy's patent, it becomes necessary to consider Chiles' right to a partition of that part.

These two pieces of land appear to have been originally settled under a claim in the name of Flournoy, and were held adversely to Hoy's title. This adverse possession had been continued for more than half a century when this suit was commenced. The statute of limitations having been relied upon by way of defence, is a complete bar to the claim asserted by Chiles, unless he can derive some aid from a judgment in an action of ejectment brought by Hoy's heirs for this land in 1817, and thereby avoid the bar relied upon by the defendants.

In the action of ejectment alluded to, a judgment was recovered in 1818 for five-sevenths of the Evalt tract of land, and also for five-sevenths of the tract of land conveyed by Jones to Nicholas Smith. In 1845 a writ of *habere facias possessionem* issued upon said judgment, and was executed by the sheriff, by delivering to the complainant, Thomas D. Chiles, possession of one undivided seventh part of the land formerly in the possession of Nicholas Smith, sen., and five-sevenths of all the land formerly in the possession of Thomas Evalt.

To preclude Chiles from deriving any benefit from the judgment in ejectment, it is alleged that it was procured by fraud, and should be disregarded. Before the judgment was recovered, a contract had been made between William Chiles, Nicholas Smith, sen., and others, by which Chiles agreed to sell to these parties, at a stipulated price, the land in their possession, and to convey to them Hoy's title to it. It is said that it was a part of the agreement, that no defense should be made in the action of ejectment, which, although in the name of Hoy's heirs, was conducted by Chiles, for

his own benefit; and that, as to the tract of land sold by Jones to Smith, and as to the land in the possession of Evalt, it is also said Chiles admitted that no recovery could be had under Hoy's title, and that he would not attempt to obtain a judgment for either of said tracts of land. It is further alleged, that the parties in the possession of the land, confiding in these promises and declarations, made no defence in the action of ejectment, although they could have proved an adverse possession for more than twenty years before the action was commenced, of both the Jones and Evalt tracts of lands; and that, notwithstanding the agreement, which is alleged to have been made for the purpose of obtaining an advantage of them, and in direct violation of it, Chiles procured a judgment to be rendered in the action of ejectment, for five undivided sevenths of the Jones and Evalt land.

It appears that a judgment in the action of ejectment was in the first instance rendered by default, and that at the same term Smith, who claimed and was in the possession of the Jones tract of land, and Evalt himself and others appeared, and upon their motion, the judgment by default was set aside, and they were entered as defendants. At a subsequent term, a trial was had, and the judgment referred to was recovered. If no defense had been made in the action of ejectment, but the judgment had been by default, as it was first entered, we should have had no hesitation in deciding that it had been obtained by fraud. The evidence in this case proves most conclusively an adverse possession of both the Jones and Evalt land, under Fournoy's claim, for more than twenty years before the commencement of the action of ejectment. How it happened that a recovery was had for five undivided sevenths only, when the land was not held under Hoy's title, and the demise was in the name of all the heirs, is an unexplained mystery, and can only be accounted for on the supposition that it was decided by the Court, upon the trial, that five out of the seven lessors of the plaintiff

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were laboring under some disability, that saved their right from the operation of the statutory bar, although it was effectual against the other two lessors. Be this, however, as it may, the proceedings in the action of ejectment show that a defense was made, and the plaintiff's claim defeated as to two undivided sevenths of the Jones and Evalt land, either by proof of an adverse possession, or some other fact that protected them, and barred the plaintiff's right of recovery to that extent. The defence thus made, and the result arising from it, are inconsistent with the statement that the parties in the possession of the land relied upon the promise made by Chiles not to sue for that part of the land, and repel any presumption that might otherwise exist that the judgment had been obtained by fraud, consequent upon the false security produced by a reliance on the promises of Chiles, which had been violated and disregarded by him.

Another objection made to the efficacy of the judgment in affording any aid to the complainant in avoiding the operation of time upon his rights, arises out of the failure to change the possession, by its instrumentality, until more than twenty years had elapsed after it was rendered. Subsequent to the execution of the writ of *habere facias*, that issued in 1845, a motion was made by the defendants therein to quash the writ and the sheriff's return, which was overruled, and one of the grounds upon which the motion was based, was the same now relied upon in this objection. The point having been once made and litigated between the parties, and regularly adjudicated upon by the proper Court, and the judgment in that case not having been reversed, must be regarded as settled, and cannot be again re-litigated between the same parties. Besides, the question is one that cannot with propriety be made collaterally in this suit, but should be made, as was done, by a direct proceeding to quash the writ, and to have restitution of the possession.

A judgment in ejectment does not change the possession nor preclude relying upon the statute of limitations, if unless the possession be changed by surrender, or executory of a writ of possession.

But in this suit Chiles cannot derive any advantage

from the judgment in ejectment, except so far as he has obtained, by virtue of it, the possession of the land in contest. The recovery of the judgment in ejectment did not of itself change the character of the possession held by the defendants in that action; nor does it have the effect of precluding them from relying upon the statute of limitations in this suit. So far as Chiles obtained the possession of the land, in pursuance of the judgment in ejectment, he can derive aid from the judgment, and avail himself of the possession thus acquired to defeat the operation of the statute of limitations, but no further. As to the remainder, the statutory bar prevails, and effectually destroys all right to relief. And as the demise in the declaration has expired, he can derive no farther aid from the judgment.

The sheriff's return on the writ of *habere facias* shows that the complainant Chiles only obtained possession of one undivided seventh part of the Jones tract of land, and five undivided sevenths of the Evalt tract. The counsel of Chiles has filed with his brief a paper purporting to be a copy of a writ of *habere facias* that issued upon said judgment in ejectment in the year 1844, with a return of the sheriff indorsed thereon, that he had "delivered to William Chiles possession of all the lands outside and north of the 700 acres as originally laid off and decreed to said Chiles." But this paper cannot have the effect to enlarge the right of the complainant, Thomas D. Chiles, for several reasons. In the first place, it does not form a part of the record, having been brought up by *certiorari*, and therefore cannot be considered as belonging to the case now before the Court. In the next place, the complainant did not set up in the pleadings and rely upon any possession that had been acquired by William Chiles under the judgment in ejectment, but relied exclusively upon that which he had himself acquired under it, and therefore the writ of possession, if it constituted a part of the record, would not sustain any claim asserted by him.

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A paper not named in the pleading, but filed with the brief of counsel, cannot be regarded as part of the record of the case.

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Land for which there is a judgment in ejectment, which may be enforced, may be sold and conveyed, without violation of the champerty law, (*Chiles vs Jones*, 2 Dana, 25.)

All persons interested, are necessary parties to a suit for partition.

The defendants had a right to have this matter, if relied upon, presented in such a form that they could have responded to it, which not having been done, it is entirely extraneous, and must be disregarded.

If however, the complainant's right to a partition, so far as he has obtained possession of the land, by an enforcement of the judgment in ejectment, is not affected by the adverse possession of the appellants, it is contended, that to entitle him to a partition, even to that extent, he must make it appear that he is invested with the title of Hoy's heirs, and various objections are made to his title. It is argued that no title passed by any of the conveyances, except the one made by the sheriff, because the land conveyed was in the adverse possession of the defendants at the time the deeds were executed. But as the land had been recovered by Hoy's heirs before the deeds were made, the case is not within the operation of the champerty law, if the judgment in ejectment was inforcible at the time, notwithstanding the possession was adverse, as this Court decided in the case of *Chiles vs Jones*, 2 Dana, 25. The doctrine established in that case does not apply, where the adverse possession has continued, until the judgment in ejectment, for some cause, has become unavailing; but in this case, the judgment has been enforced, and of course the doctrine must have its full application. Besides, some of the deeds were executed after the sheriff had delivered the possession of the land to the complainant, at a time when no adverse possession existed, and they would be valid, if the others were not.

It does not appear from anything contained in the record, that the wife of John Sappington ever conveyed her title to any person, nor is she named in any of the commissioners' deeds, nor in the deed made by the sheriff, although he was one of the heirs of William Hoy, deceased. But as Hoy's heirs, or those holding under them, had title to so much of the land in contest as was outside of the 700 acres decreed to Boone's heirs, and as the complainant was invested with the title of part of the heirs, he had a right to take posses-

sion of the land, for the joint benefit of himself and the other heirs; and so far as he obtained the possession, he and they have a right to have partition; but unless he can exhibit a title from all the heirs, it will be necessary to make other parties to the suit, as the heirs who have not been divested of their title, should be brought before the Court.

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As, however, the complainant's evidences of title are rendered somewhat ambiguous by the failure to make it appear, in the copies of the decrees exhibited, which of the heirs of Wm. Hoy were made parties to the suits in which the decrees were pronounced, the complainant will be allowed, upon the return of the cause, to produce such other additional evidence of title as he may deem proper; and unless he shall be able to manifest a complete title in himself, he must make such of the heirs parties as still retain the title, but they are to be brought before the Court, merely for the purpose, and no other, of authorizing a partition to be made, by which they, together with the complainant, will obtain one undivided seventh part of the Jones tract of land, and five-sevenths of the Evalt tract, outside of the seven hundred acres conveyed to Boone's heirs.

Wherefore, the decree is reversed and cause remanded for further proceedings, and decree in conformity with the opinion.

Davis and Trimble for plaintiff; *Chiles* for defendant.

CHANCERY.

Peyton vs Lewis, &c.

Case 67.

APPEAL FROM THE LINCOLN CIRCUIT COURT.

October 14.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

The case stated
and decree of
the Circuit
Court.

PEYTON and LEWIS, being partners in merchandizing, the former retired from the business, and sold out, his entire interest in the partnership effects, embracing the merchandize on hand, together with all the other partnership property, and the debts of every description due to the firm, to Logan, who agreed to pay him therefor the sum of six hundred dollars, and to be responsible for the debts, due by the firm, to the extent that Peyton was liable.

The sale was made to Logan, by the retiring partner, with the consent of Lewis, the remaining partner, and with the express understanding that the business was to be continued by the new firm.

This dissolution of the partnership occurred in November, 1848. The new firm continued to carry on the business for sometime, and then dissolved, and sold out the stock on hand. Logan became insolvent, and Lewis, the other partner, has had to a great extent, the management of the partnership affairs, since they dissolved their partnership, and made sale of the stock.

Subsequently this suit in Chancery, was instituted by Peyton, who alleged in his bill, that some of the debts due by the firm of Peyton and Lewis, still remained unpaid, that when he sold out, and retired, he left in the hands of the new firm, assets sufficient to have paid and satisfied, all the debts that were owing by the old firm, and that the members of the new firm undertook and promised to pay said debts. He further alleged that Logan was insolvent, and Lewis intended to dispose of, or remove his property, for the fraudulent purpose of preventing the payment of his debts; and he

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prayed for, and obtained an attachment against his estate. Lewis in his answer, denied the fraud imputed to him, and also denied that he had agreed, when the complainant sold to Logan, to pay, the debts of the original firm, or to release him from all further responsibility for them.

During the pendency of the suit, the complainant was sued for a debt of upwards of seven hundred and fifty dollars, that the old firm owed to a certain Joseph McAllister, and a judgment recovered against him for the amount, which he replevied. The parties agreed that the complainant, as to this debt, should be regarded as having paid it, and be entitled to any relief he might have a right to, if he had alleged the fact in an amended bill.

There does not appear to have been any express stipulation, upon the part of Lewis, when the complainant retired from the firm, that he would pay off the existing demands against the partnership, and indemnify the retiring partner against them. Unless, then, such a promise on the part of the new firm, can be implied from the facts attending the arrangement, and the nature of the transaction, the complainant was not entitled to any relief, and his bill was properly dismissed by the Court below.

The established doctrine is, that when a retiring partner leaves a sufficiency in the hands of the remaining partners to discharge the existing demands, the law will imply a promise on their part, to save him harmless; and if he be compelled to pay any of the debts, he may require them to reimburse the amount. *Gow. on Partnership, 268.*

Upon the dissolution of a partnership, either of the parties may insist on a sale of the joint stock, and a collection of the debts due to the firm, and have an application of the produce to the payment of the joint liabilities. But in a case like the present, that right is waived, and the business is continued by the introduction of a new member, and the formation of a new

Where one member retires from a partnership, with the consent of the remaining partners leaving a sufficiency of funds to pay the debts, the law will imply a promise to save the retiring partner harmless: (*Gow. on Partnership, 268.*)

If one of two partners sell to a third person, with the consent of the remaining partner, and the new partner agree to save the out going, part

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vs
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ner harmless.
The new firm are
bound to appropriate the assets
to the payment
of the debts of
the old firm, and
if they misapply
them, they are
individually liable
to reimburse the
out-going partner
for any payments by
him.

firm. As the new firm took into its possession the assets of the previous firm, and the incoming partner agreed to take his interest, subject to the payment of the existing demands, and the remaining partner held his interest subject to the same charge, it is evident that they virtually undertook the payment of the debts to the extent of the value of the effects in their hands. A trust was created between the retiring partner and the new firm, for the proper application of the means placed in their hands, and as the individual interest of each of the members was limited to the balance that might remain, after the discharge of the debts of the old firm, the trust was violated, by the appropriation of more than that balance to any other objects than those embraced in its terms, and contemplated by the parties, when it was created. The express agreement by the new partner, that he was to be responsible for the debts of the old firm, to the extent of the vendor's liability, does not repel the implication of a joint undertaking to indemnify the retiring partner, if the assets were sufficient for that purpose. As the sale transferred the interest of the retiring partner in the whole of the joint stock, to the purchaser, it was necessary that the agreement of the parties should show the terms upon which the transfer was made. By these terms the new partner assumed the place of the retiring partner, with all his rights, and agreed to discharge all his liabilities.

The complainant's right to relief, then, must depend upon the sufficiency of the assets for the payment of the debts. He alleged their sufficiency for that purpose, and the answers of the defendants substantially admit the truth of the allegation. The fact is also established by the testimony, at least so far as it is, from its nature, susceptible of proof. It also appears that the new firm recognized its liability for the payment of the debts of the previous firm, and that Lewis, the remaining partner, acting upon the implied agreement, declared that the complainant was not to pay any of the debts of the old firm.

But the charge of fraud against Lewis was not established, and the complainant can only obtain relief for the debt he has paid to McAllister since the commencement of the suit. If he should hereafter be compelled to pay other debts due by the partnership at the time he withdrew, he may then require the defendants to repay him the amount.

Wherefore, the decree is reversed and cause remanded, that a decree may be rendered in conformity with this opinion.

Burton and Smith for appellant; *Bell* for appellees.

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DECISIONS
OF THE
COURT OF APPEALS
OF KENTUCKY.

WINTER TERM---1851.

Commonwealth vs Voorhies.

ERROR TO THE MERCER CIRCUIT.

Towns. Tippling houses. Taverns.

JUDGE MARSHALL delivered the opinion of the Court.

THIS was an indictment for retailing spirituous liquors and keeping a tippling house, without a license to keep a tavern, in the county of Mercer. The case was submitted to the Court upon a statement of agreed facts, from which it appears that the facts charged, were committed in a house in the town of Salvisa, after the defendant had obtained a license from the trustees of the said town, and after he had upon producing the same to the clerk of the Mercer County Court, obtained from him a license, to keep a coffee house, for which he paid ten dollars, and that after obtaining these licenses he proceeded to sell spirituous liquors, as is usual in coffee houses, in his house, kept as a coffee

INDICTMENT.

Case 69.

December 4.

Case stated.

COMMONWEALTH
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house, and which had all the requisites of a coffee house. On these facts, the Court being of the opinion that the law was for the defendant, dismissed the indictment. And the sole question now to be decided, is whether the license from the trustees of Salvisa, and that from the clerk of the Mercer County Court, protected the defendant from the penalties denounced by statute, against the keepers of tippling houses, and the retailers of spirituous liquors.

The general laws for regulating towns in Kentucky, gives no authority to the trustees of towns, to license the retailing of spirituous liquors.

It is not, and cannot be contended that either the trustees of the town, or the clerk of the county, have any authority to license the retailing of spirituous liquors, except so far as the same is conferred upon them by statute. Nor is it suggested that the license from the clerk was of any avail, unless that on which it was founded, viz: the license from the trustees, was authorized by law. The acts of assembly relating specially to the town of Salvisa, give no authority to its trustees to grant such license, nor do we find that any general act for the regulation of towns gives an authority of this kind to the trustees of towns generally. We do find, however, that in various instances the Legislature has conferred this power upon the trustees or other local authorities of particular towns and cities. And by the 12th section of an act of 1849 (*Sess. acts* 47,) entitled an act to increase the revenue, it is enacted "that each and every keeper of a coffee house, or other person who shall be licensed by any city or town authority to retail or sell spirituous liquors, shall pay a tax of ten dollars to the clerk of the County Court of the county of his residence, who shall account for and pay over, the same as he is required by law to account for and pay over tax on tavern license, &c., &c., and any coffee house keeper or other person who shall sell or retail spirituous liquors without having paid such tax, is subjected to all the penalties imposed upon persons who sell or retail spirituous liquors without license, it is under the foregoing provisions of the act of 1849, that authority is claimed for the trustees of

the town of Salvisa, and of course for the trustees of all other towns, to license the selling or retailing of spirituous liquors. And no other act is referred to as giving the authority claimed. The correctness of the judgment before us depends therefore exclusively upon the construction to be given to this twelfth section.

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If prior to the passage of the act of 1849, no city or town had been empowered to license the selling or retailing of liquors, there might be reasonable ground for contending that by the 12th section of the act all cities and towns in the Commonwealth were so empowered. For although there is no direct grant of such power, yet as without the existence of such power in some cities or towns, the whole section would be inoperative and futile, because the subject to which it refers and which it professes to regulate has no existence, and as the Legislature might create or authorize the practice which is expressly regulated and made a source of revenue to the State, it might, and perhaps should be implied that it was intended, though indirectly, to authorize the practice, and thus to create the subject on which the provisions of the twelfth section were to operate. In the case supposed, the section could have no possible operation without supposing or implying a power to license in some towns or cities; and there being no discrimination made, if the power is implied in some, it must be equally implied in all.

But as several of the towns, and perhaps all of the cities in the Commonwealth, had been expressly authorized to grant license for selling or retailing, there was ample subject for the operation of the 12th section, and no necessity for implying a grant of power to any town or city. The words of the section are satisfied by referring them to the existing power in the authorities of the several towns and cities to which it had been or might afterwards be granted. There is nothing in the 12th or any other section of the act, nor in its general scope or object, importing the grant of a new power to any town or city. And as such a grant

The 12th section of the acts of 1849, (*sess. acts* 47,) has application alone to the cities and towns, which at the passage of that act, had authority to grant license to retail spirits. That act gave no new authority to trustees of towns or cities, to grant such license.

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vs
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could only be implied by a forced construction, to be justified only by a necessity which does not exist, and as the implication by remote inference only of a grant of power on this particular subject, would make this act a departure from the general course of legislation on the subject both of towns and of the retailing of liquors, as to each of which it has generally been cautious and explicit, we do not feel authorized to decide that the Legislature intended by the mere reference to an authority in towns and cities, which may be satisfied by the authority then existing and afterwards to be conferred, to extend that or a similar authority to all towns.

The defendant and the clerk of the County Court and the trustees of Salvisa, have all no doubt acted under the supposition that the trustees had authority to license the retailing of liquors, and a contrary conclusion by this Court may subject the defendant, who has paid his money to the town and the State for his license, to penalties for an offence when he thought he was complying with the law. But however these considerations may operate on the question of enforcing the penalties, should any be adjudged against the defendant, or whatever right they may give him to have his money paid back, they can have no possible influence upon the construction of a general statute. Nor can a mistake of the law furnish a legal excuse for an offence denounced by the law.

Wherefore, as upon the agreed facts the defendant was guilty of the offence charged, the judgment is reversed and the cause remanded for a new trial.

Harlan, Attorney General, for Commonwealth.

Salmons vs Webb.**ERROR TO THE JOHNSON CIRCUIT.***State boundary. New trial. Verdict.*

JUDGE MARSHALL delivered the opinion of the Court.

THE act of 1799, establishing the boundary line between Virginia and this Commonwealth, (*Statute Law*, 266,) shows that there had been doubts among locators of land, as to which of the main forks of Big Sandy river constituted the true boundary, and that lands within this disputed or doubted territory had been entered under the authority of each State. The boundary, as fixed by commissioners from the two States, left within one or within each, lands which had been entered in the offices of the other, and it was made a condition of the agreement fixing the boundary, that these entries should be as valid as if made in the State in which the land lies, and that until mutual acts should be passed by the two States ratifying said claims, the agreement should not take effect. The act above referred to, after reciting the agreement at large, adopts the boundary therein fixed, and enacts that entries made in the offices of Virginia previous to the first day of October, 1799, for lands between the forks of Sandy, and which, by the line adopted, fall within the limits of this State, shall be as good and valid as if made in the proper offices in this Commonwealth. In June, 1800, a patent was issued by the State of Virginia to one Wolcott, for several hundred thousand acres of land between the forks of Sandy, referred to in the act of 1799, but founded upon a survey made in 1795, and of course upon a previous entry. And Salmons, the defendant in this action of ejectment, brought upon two small patents issued by Kentucky upon Kentucky land warrants since the year 1800, having read in evidence

EJECTMENT.*Case 70.**December 5.**Case stated.*

SALMONS
vs
WEBB.

Patents issued
by the State of
Virginia, for
land lying in the
forks of Sandy
river, subse-
quent to the first
of October,
1799, conferred
no title, though
the entry had
been made be-
fore that date.

the older patent of Wolcott to protect his possession, and the Court having afterwards excluded that patent from the jury, the principal question now presented is, whether this Virginia patent for lands within the limits of Kentucky, conferred any title, or is entitled to any effect in this action?

This question depends entirely upon the agreement recited in the act of 1799, and upon the terms of the act itself. The agreement, which we have not quoted entire, uses sometimes the word 'claims' and sometimes the word 'entries,' but it seems to narrow down the extent of the word 'claims' by the final clause, introduced obviously for the purpose of definite explanation, and commencing with these words: "that is to say, that all entries of land made in the offices of either State," &c. And the enactment made in pursuance of the agreement, adopts and is based upon this construction, since it only provides "that all entries for land made in the offices of Virginia," &c., "shall be as good and valid as if they had been made in the proper offices in this Commonwealth." The most liberal construction of the agreement and the statute cannot make them go further than to recognize and confirm the Virginia claims within the debateable territory, in the condition in which they actually were on the first day of Oct. 1899, by making them as valid as if the acts on which they were founded had been done under the authority and in the proper offices of this State. But even this construction, the propriety of which is not now in question, if it might give validity to patents issued by Virginia before the settlement of the boundary, neither recognizes nor confers any authority for the subsequent issuing of patents by that State for lands within the limits of Kentucky as then fixed. On the contrary, by failing to provide that Virginia might go on to consummate the titles commenced under her authority, and by giving to such titles, or claims, or entries, the same validity as if made in the proper offices in Kentucky, the agreement and the statute would seem to refer the

consummation of such of these titles as were in an imperfect condition to the latter State, in which, by the ascertainment of the boundary, the undisputed title and sovereignty of the soil, and the absolute right of disposition, except so far as qualified or renounced by herself, was admitted to abide.

By recognizing and declaring the validity of entries (or other claims) under the authority of Virginia as if made in the proper offices in this Commonwealth, Kentucky bound herself to consummate them as if made in the proper offices here, leaving to the claimants and to the State of Virginia, to devise and pursue the means for bringing the evidences of such claims into the proper offices here and placing them in a condition to be consummated according to her own laws. This being in our opinion the full extent of her obligations and concessions, it follows that after the boundary was fixed she alone possessed and could grant the title to the lands within her territory previously disputed. In stating her right in this qualified manner, which is all that is necessary for the present case, we intimate no opinion as to the validity or effect of patents for land within the disputed territory, issued by Virginia before the first day of October, 1799, which, as already said, is not now in question. The act of 1799, above referred to, was, by its own terms, to go into effect when Virginia should, in conformity with the agreement of the commissioners, pass a similar law, of which there is no direct evidence. But the boundary referred to in the act, has been from that time recognized without dispute, and must be taken as being in fact and in law the true boundary of the State. And as the rights of Kentucky, within her own territorial limits, would be at least as great, independently of the act of 1799, as they are under the terms of that act, it is immaterial, so far as concerns the present case, whether that act ever took effect or not. It is only by her concession that any appropriation of her land by another State can be entitled to the slightest respect. And if it be

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admitted, that under the relations which had existed between Virginia and Kentucky, and in view of the uncertainty as to the true boundary between them, some concession of territorial rights should be made, it cannot be admitted that more was due from Kentucky than is made in the agreement and statute referred to. In every view therefore, we are of opinion that the patent to Wolcott conferred no title to any land within the limits of Kentucky, and was, therefore, properly excluded from the jury. We have no reason to doubt, however, that Virginia passed the requisite act adopting the boundary and the terms of the agreement.

Where the jury have decided a fact in issue, depending upon the opinions of witnesses, their decision is not to be disturbed by the Court.

The defendant also exhibited and relied on a patent from this Commonwealth to one Taylor older than either of the plaintiff's patents, and it is contended that the Court should have granted a new trial on the ground alleged, that the verdict finding in effect that the patent to Taylor did not cover the land in dispute, was in this respect contrary to the evidence, or at least to the weight of the evidence. But the evidence rested merely in the opinion or judgment of witnesses whether a line pursuing a certain course from a designated point several miles distant from the land in contest, would reach or include it. None of the witnesses had traced the line either with or without a compass, and they differed in opinion as to the matter in question. Although the witness who supposed the line would include the land in contest was a surveyor, and the two who thought differently were not surveyors and may have been unacquainted with the use of the compass, still they were well acquainted with the region of country and the referred to. And the jury having under their right of weighing the testimony found a verdict which the presiding judge refused to set aside, it cannot according to the practice of this Court, be disturbed on the ground that it is against the weight of the evidence.

A verdict in ejectment, "that the defendant is

The jury by their verdict "find the defendant guilty of the trespass in the declaration mentioned, and that

the plaintiff recover the term yet to come in the declaration mentioned, and one cent in damages." And it is contended that this verdict did not authorize a judgment for any thing more than one cent in damages and the costs. But the verdict though informal, shows plainly enough that the jury found the defendant guilty of the trespass and ejectment in the declaration mentioned. If this were not sufficiently indicated by other parts of the verdict, it is clearly and sufficiently implied in the finding that "the plaintiff recover the term, &c." And indeed there is no dispute as to the fact fully proved, that the defendant was in possession of the land in contest at the commencement of the action. But without resorting to the evidence, we think the verdict substantially sufficient.

Wherefore the judgment is affirmed.

Apperson for plaintiff.

FRAZIER
vs
COMMONWEALTH.

guilty of the trespass in the declaration mentioned, and that the plaintiff recover the term yet to come in the declaration mentioned, and one cent in damages," though informal is sufficient.

Frazier vs Commonwealth.

ERROR TO THE LINCOLN CIRCUIT.

Fines. Governors power in regard to fines &c.

JUDGE HISE delivered the opinion of the Court.

THE authority of the Governor, to remit fines and forfeitures is so restricted by our present Constitution, that he cannot in its exercise in future obstruct or defeat the operations of such laws as have or may be passed giving to prosecuting attorneys a part of such fines and forfeitures as compensation for their services, and as incentives to a prompt, vigilant, and faithful discharge of their public duties—hence the question

INDICTMENT.

Case 71.

December 6.

The Governor of Kentucky, under the present constitution, has no power to remit that part of a fine which the law may set apart to attorneys of the commonwealth for their services in prosecuting offenders to conviction—*argu.*

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presented in this case is now of but little importance whichever way it may be decided. J. T. Boyle, as Commonwealth's attorney for the 12th judicial district, prosecuted George Millea on an indictment for keeping a tippling house, and obtained a judgment against him for the sum of 60 dollars, the penalty imposed by law for the commission of the offence charged. After the judgment was replevied, the Governor remitted one half of the fine, to-wit; 30 dollars. And the only question presented, is, whether the prosecuting attorney is entitled to the whole, or to only one half of the residue of the fine which was not remitted.

Attorneys for the commonwealth, were by law, entitled to one half the fine adjudged against those convicted of keeping tippling houses. The Governor under the late constitution had power to remit the whole fine, but if he remit less than half, or more than half, the part not remitted to the extent of not more than half should be paid to the attorney for the commonwealth.

The prosecuting attorney is by law entitled to one half of the fine recovered against a person convicted of the offence of keeping a tippling house. But it is insisted that as such law can have no effect to limit or restrict, in any degree, the constitutional authority of the executive to remit the whole or any part of such fines—that the portion thereof allowed to the commonwealth's attorneys as compensation for service may be surrendered altogether, or reduced in amount at the discretion of the Governor. Let this be admitted, yet it is the opinion of the Court that if the Governor remits a part of the fine only, and leaves a part to be enforced, less than half or which is precisely one half of the amount of the fine for which judgment had been recovered, then the commonwealth's attorney is entitled exclusively to the whole of the residue of the fine not remitted, if it does not exceed one half of the amount of the judgment recovered. The Governor may remit the whole fine and thus deprive the attorney of his legal compensation. But if the Governor does not remit the whole but only a part of the fine, the attorney is by law entitled to the whole of the residue, if not more than sufficient to pay to him the proportion of the whole amount of the judgment recovered which the statute gives to him.

Wherefore the judgment of the Circuit Court hav-

ing been rendered in conformity with this opinion is affirmed.

ALLEN, &c.
vs
EVERETT, &c.

Harlan, Attorney General, for plaintiff; *Robertson* for defendant.

Allen, &c. vs Everett, &c.

ERROR TO THE ALLEN CIRCUIT.

Wills, witness. Evidence.

JUDGE HISE delivered the opinion of the Court.

A paper purporting to be the last will and testament of Alice Duff, dated the 5th of June, 1837, was, upon the evidence of the two subscribing witnesses thereto, Chilton and Wesley Duff, admitted to record by the Barren County Court at its October term, 1843. After making some provision for the education of a youth who lived with the testatrix, named Benjamin D. Lawrence, and making an inconsiderable bequest in his favor, the testatrix gives the residue of her estate, real and personal, to Ewell N. Everett, "for the special benefit of his wife Sally Everett and her heirs." John Martin, Esq., was appointed executor, but refused to qualify as such, and Edmund Duff was thereupon appointed administrator, with the will annexed. After probate of the will, Sally Everett died, leaving several infant children. In February, 1846, William Allen and others, claiming to be the legal heirs of Alice Duff, deceased, institute their suit in chancery against E. N. Everett, the surviving husband, and the infant children of Sally Everett, deceased, and against Edmund Duff, administrator, with the will annexed, for a settlement and distribution of the estate of Alice Duff, deceased,

CHANCERY.

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December 8.

Case stated.

12m	371
91	78
91	378

ALLEN, &c.
 EVERETT, &c.

Decree of Cir-
 suit Court.

Grounds relied
 upon for new
 trial.

as though she had died intestate, and to set aside the will referred to. After the case was fully prepared for trial and the usual issue was made up, the questions of fact involved were submitted to a jury, who returned their verdict in favor of the will; and therefore, the Court, after overruling the motion for a new trial, rendered a final decree establishing the will and dismissing the bill of complainants' with costs. The plaintiffs in error and complainants in the Court below demand a reversal of the decree upon the following grounds:

I. That the Circuit Court erred in giving the instructions numbered 2 and 3, at the instance of the defendants, as follows, to-wit:

"2d. The Court instruct the jury, that if they believe from the evidence, that the paper in controversy was *legally executed* by Alice Duff, as her last will; and that she was of sound mind when it was so executed; that she could not thereafter revoke the same by any parol declaration whatever, or by denying that she had a will, or by declaring if it was lost or destroyed that she would make no will, or declarations to that effect in substance.

"3d. On motion of defendants, the Court instruct the jury, that if they believe from the evidence that the paper in controversy, and now produced, was executed as *required by law*, and that Mrs. Alice Duff never did direct, or attempt to destroy, annul, or obliterate the same; and when informed that it could not be found when she requested Mrs. Everett to look for it, said in substance if, or as it was lost or destroyed she had no will, and would make none; that such declaration does not revoke the will, provided the jury believe from the evidence it was *legally executed*."

It is insisted that these two instructions are erroneous, because of the insertion of the words therein, '*legally executed*' and '*executed as required by law*,' without any further explanation showing precisely how a will can be legally executed; that as they stand, the

Court erroneously submitted questions of law to the jury for their decision.

ALLAN, &c.
vs
BENNETT, &c.

It is manifest that these instructions were not framed with the design of informing the jury as to the precise manner of executing a will, as prescribed by the statute of wills, but for the single purpose of presenting a proposition of law undoubtedly correct, pertinent and applicable to the issue before the jury, as the proof shows, to-wit: that upon the fact *assumed*, that a will has been once made in conformity to the statute; that such and such speeches and declarations as those recited in the instructions, or others of like import, do not amount in law to a revocation of such will.

These instructions only presented, as was designed, a proposition of law, which, as stated, is incontrovertibly correct upon the subject of the revocation of the will, and not upon the subject of its legal execution. A state of fact, or a *proposition of law*, either, may properly be assumed hypothetically in instructions to a jury, in which they are further instructed, that if the proof convinces them that certain other facts exist, or that although they may believe from the proof that certain acts have taken place, or declarations or speeches have been uttered by a party, that such or such legal result would follow, and their finding should be accordingly.

In this case, the Court might well instruct the jury, that *a will* could not be revoked by such speeches and declarations as those ascribed to the testatrix, and which are stated in the instructions now in question, though they should believe from the proof that those speeches and declarations were made by her, the purpose being to instruct the jury upon a point of law, not upon the subject of the *execution*, but upon the subject of what would not effect a legal revocation of a will. And surely, in the instance just given such instruction would not be vitiated, but rather improved, if improvement were required, by substituting the expressions, '*a valid will*,' or '*a regularly executed will*,' or the '*will is*

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question if regularly executed,' would or would not be revoked, &c.

If, however, the objection to these instructions would be sustainable, in case no others had been given in which the jury were told what was required by law in order to the legal execution of *a will*, yet the Court below, in the series of instructions given to the jury, gave two, in which they were particularly informed what was required by law with respect to the execution of last wills and testaments, to give validity to them, to-wit: the instructions each numbered 1—one given at the instance of complainants, the other at the instance of the defendants. And for this, if for no other reason, the objections urged against the instructions numbered 2 and 3, above quoted, must be regarded as untenable.

II. In the trial of this case, the complainants offered to prove certain declarations and confessions of Ewell N. Everett, the husband of Sally Everett, made subsequent to the date of the will, but before the death of the testatrix, and whilst Sally Everett, his wife, was still living. That portion of the depositions of several witnesses, containing these confessions and declarations of E. N. Everett, were excluded from the jury, and the correctness of this opinion is questioned by the bill of exceptions. The confessions were pertinent to the issue, and if admissible, may have, to some extent, produced an influence upon the minds of the jury unfavorable to the will and consequently to the interests of Everett's wife, Sally Everett, the principle devisee. After making some inconsiderable provisions in favor of a youth who had lived with testatrix, the will directs that all the rest of the estate, both real and personal, should be delivered by the executors to Ewell N. Everett, for the special benefit of Sally Everett, his wife, and her heirs.

It is contended on one hand, that Ewell N. Everett's declarations, though calculated, if permitted to go to the jury as evidence, to operate against the will, are

not admissible, because he was himself a competent witness at the time of the trial, his wife being then dead; and to receive proof of his declarations, would violate that rule of evidence which excludes mere hearsay. But is it true that he was a competent witness at the time of the trial? Certainly not, if he had a direct personal interest in the establishment of the will in question.

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If the devise in this will creates a separate trust estate in the land, slaves and personalty of testatrix, in favor of Sally Everett and her heirs, and N. E. Everett, as trustee, took nothing more by the will than the naked legal title to the estate, to be held only for the separate use and benefit of Sally Everett; then his attitude would be substantially analagous to that of an executor, being fiduciary merely, and having no greater interest in the general estate, the title of which would be merely vested in him, for the exclusive use of others, than the executor would have, as the personal representative of the testatrix in the personal estate, the qualified right to which would vest in him for the exclusive use of creditors and legatees. The well settled rule, therefore, under which an executor has been admitted as a competent witness for or against the will in which he is appointed as such, would, upon principle and by analogy, apply to the case of a trustee, appointed by a will as a mere depositary of the legal title to an estate, to be held only for the use and benefit of others; and such trustee would be also a competent witness in a proceeding to establish or annul the will from which he derives his appointment. And had not Ewell N. Everett been the husband of Sally Everett, the principal devisee in this will, he would have been, as contended, a competent witness, and as such, his declarations would have been inadmissible. But, though as trustee he would be competent, yet, as he also bore the relation of husband to Sally Everett, the *cestui que trust* for whose special benefit nearly the whole estate, consisting of lands, slaves and personalty, was devised

A husband of a devisee of lands and personal estate who has no interest, may be a competent witness to prove the will. But his declarations made before the death of his wife, are not evidence against the will after the death of the wife.

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in trust to him, had he or not such a personal interest in the establishment of the will, as should disqualify him as a witness, and render him incompetent at the time of the trial of the cause, his wife having died before that time? Under the will in question, his wife would take an absolute *fee simple separate trust estate* in all the property devised to her, both real and personal. If the will be not set aside, Everett would be entitled, as tenant by the courtesy, to a life estate in the land, the use in which was devised to his wife, (See 1 Statute Law, 444;) and he would be absolutely entitled to the personal property if reduced to possession, or if held adversely it could be recovered by him as his wife's administrator and appropriated to his own use. Hence we conclude that, though his wife was then dead, Everett was not a competent witness in favor of this will, at the time the cause was tried. But nevertheless, the Circuit Court did not err in excluding Everett's declarations, because they were made, as appears from the depositions in which they are stated, whilst his wife, Sally Everett, was alive, and before the death of testatrix, though subsequent to the date of the will, and when he had no interest whatever.

This Court is not prepared to sanction, as a principle or rule of evidence, that the declarations of a person should be admitted as evidence against a party litigant, merely because they were made at a time when such person could not legally give evidence at all in the cause. The declarations even of a party interest, though a litigant himself, are received in evidence with great distrust, though made understandingly and with the knowledge that such declarations may legally be used in evidence against him. The declarations of Everett were made at a time when nothing that he should or might say, could be used as evidence for or against the will in question; because he was then the husband of the principal devisee, and at a time when, even though he had not been the husband of Mrs. Everett, he was no such devisee, and had no such interest under

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the will as could authorize him by his declarations, be they what they might, to effect thereby injuriously the interest and rights of others under the will. Declarations so made, and when Everett, who made them, had no interest, and knew they could not be used as evidence against his wife, then living, or against the will, should not have been admitted on the trial, merely because *then* it had become his interest that it should be established by reason of the subsequent death of his wife. This view is not in conflict with the former opinions of this Court, given in the cases of *Rogers vs Rogers*, 2 B. Monroe 325, and of *Beall, &c. vs Cunningham, &c.*, 1 B. Monroe 401. In those cases, the parties whose declarations against their interest under the wills in contest were decided to be admissible as evidence, were devisees and held important interests under the wills at *the time when* their declarations were made. Here Everett was a mere trustee; no beneficial interest whatever was devised to him in the will in question, and at the time the said declarations were made by him, his wife was living, and the interest he now takes under the will, by reason of his wife's death, did not then exist. The Court, therefore, did not err in excluding the evidence of Everett's confessions, made before Sally Everett's death.

The Circuit Court refused to give the jury the instruction number 4, asked for by the complainants, and properly, because, even had there been proof in the cause upon which to base it, yet, without material qualifications, it ought not to have been given. The purport of this instruction is this, that if the paper in contest was subscribed by Everett and Chilton Duff, or either of them, as subscribing witnesses in the presence of the testatrix, and upon her acknowledgment that it was her last will, but before she had subscribed her own name thereto, and that when she afterwards signed the paper, it was only acknowledged by her before one witness, Wesley Duff, that in such case it was not a valid will.

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The proposition thus presented in respect to the paper in question is not, without an essential qualification superadded, in accordance with the well settled principle of law, to the effect, that where the name of a testator is inserted in the body of the will, though not signed otherwise, and is thus acknowledged, with the *intent* to publish it in that form, as his or her last will and testament, such will would be valid, though acknowledged at different times to the subscribing witnesses, who may witness and subscribe the paper as witnesses, in the absence of each other.

The name of a testator in the body of a will which he publishes and causes to be witnessed in his presence is a sufficient signing.— If so attested by one witness and subsequently signed and acknowledged before another witness, it is a valid publication: 4 Dana, 1.

The name of the testatrix is inserted in the body of this will, and her signature is also affixed to the bottom thereof; and if acknowledged by her to be her will to Chilton Duff before she signed it, but with the *intention* at the time of publication to give complete effect to it as her last will and testament without her signature, it is valid, notwithstanding she may have afterwards, at a different time, signed the will and then acknowledged it before another subscribing witness. (See 4 Dana 1 *Sarah Mile's will*.)

The instruction should have been qualified by the addition of the words "provided the testatrix did not intend to give complete effect to the paper as her last will, by such acknowledgment before Everett and Chilton Duff, until she should place her signature thereto;" and containing no such qualification, the instruction ought not to have been given, and was properly refused for that reason; and also, because Chilton Duff proves positively that testatrix had signed the will at the time he finished writing it, when it was acknowledged before him, and when he subscribed it as a witness. He was the writer of the will and the first witness to it, and it was afterwards, according to uncontradicted proof in the cause, that Everett and Wesley Duff heard the acknowledgment of testatrix, and actually attested the will. The proof, therefore, warranted the Court to refuse this instruction, even though the proposition of law therein set forth had been correct.

As to the questions of fact presented in the record, of fraud in the procurement of the execution of the will, and in preventing its subsequent intended revocation by the testatrix, their settlement belonged properly to the jury, and from a careful examination of the proof we are not prepared to decide that the verdict of the jury was contrary to the weight of evidence in the cause, or that a new trial was erroneously refused.

Wherefore, the decree of the Circuit Court is affirmed.

Harlan and Lindsey for plaintiffs; *Herndon* for defendants.

DORCH, &c.
vs
THOMPSON.

Dorch, &c. vs Thompson.

ERROR TO THE GREENUP CIRCUIT.

Ejectment. Limitation.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

THIS was an action of ejectment by the junior patentee, against persons holding and claiming under the elder patent, and the plaintiff having recovered a judgment, the defendants have appealed to this Court.

The principal question to be determined, is, whether a junior patentee who has had such a possession of the land, as is contemplated by the statute of 1809, (*2 Digest Stat. Law*, 1141,) for seven years, can maintain an action of ejectment against the elder patentee, or those claiming under him, if he or they should subsequently acquire the possession.

It is well settled that a continued adverse possession of land for twenty years, not only bars any right of entry, which other persons, not laboring under any disability may have had, but that it confers upon the per-

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Case stated.

Question for decision.

Twenty years adverse possession of land not only tolls the right of entry of one having the

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elder legal title, and who does not labor under any disability; but it gives a right of entry upon which an action may be maintained to recover the possession.

Adverse possession of slaves or other personal property for 5 years not only deprives the former owner of all remedy for recovery, but divests the legal right & vests it in the holder, who may maintain his action against the former owner if he acquired the possession: 5 *Litt.* 82. 3 *J. J. Marsh.* 278, 368, 374. 6 *Litt.* 439.

Seven years possession of land by a junior patentee or those claiming under him, does not expressly bar the right of entry of the elder patentee under the act of 1809 (2 *Stat. Large* 1141,) unless it be continued up to the bringing of the action by the elder patentee. And if a possession be continued for 7 years and abandoned,

son so possessed, a right of entry; and as the right of entry and of possession are alone triable in the action of ejectment, he has a right of action to recover the possession against any person who may have wrongfully acquired it.

It has also been held by this Court that an adverse possession of slaves or other personal property for five years, so that the bar arising under the statute of limitations becomes complete, not only deprives the actual owner of all remedy for the recovery of the property, but also divests the legal right which becomes vested in the adverse holder, so that he can, if the property comes into the possession of the former proprietor, maintain a suit against him for it: (5 *Litt.* 282. 3 *J. J. Marsh.* 278, 368, 374. 6 *Litt.* 439.)

In the former case where there has been an adverse possession of land for twenty years, claimants laboring under no disability, are under the statute of limitations, barred from any entry afterwards, and having no right of entry, cannot maintain an action of ejectment to recover the possession. And in the case of personal property the statute of limitations having operated to divest the actual owner of all legal remedy for the recovery of the property, the legal right to it is also lost, and vests in the person who has had an adverse possession for five years.

But seven years possession under the act of 1809, by a junior patentee or those claiming under him, does not expressly bar the right of entry of the elder patentee, nor does it deprive him of the right, at all subsequent time, after a seven years possession has been had, and has been discontinued, to maintain a suit for the land that has been thus adversely held in possession. By the second section of the act it is provided: "That possession as aforesaid to bar the actions or suits aforesaid, must and shall have continued for the aforesaid term of seven years next preceding the commencement of any such suit or action." Under this provision, a possession for seven years at a previous time, but which

has not been continued until the suit is brought, will not bar the action of the elder patentee.

The statute was evidently enacted to protect the actual settler, and that protection was to be extended to him, so long as he continued his residence upon the land. But if after having resided upon, and having it in his possession for seven years, he should quit the possession, and afterwards return and regain it, he would not be able to protect himself against the claim of the older patentee by relying upon his former possession of seven years. If a possession under the statute for seven years does not bar the right of entry of other claimants, or deprive them of all legal remedy during all subsequent time, and under all circumstances, for the enforcement of the right, as it is apparent that it does not, it follows, as a necessary consequence, that it cannot have the effect to transfer the right of entry to the person who has had such a possession for seven years, or to enable him to maintain an action of ejectment against the holder of the better title, or those claiming under him. The very reason upon which the doctrine is founded, which vests the right, in the cases of twenty years' possession of land, and five years' possession of personal property, in the party in possession, demonstrates its inapplicability to a seven years' possession under the act of 1809. When a possession is of such a character as to deprive others of all legal remedy to recover the thing held in possession, it imparts to the person in possession a right to the thing thus held. But under provisions of the statute of 1809, a possession for seven years does not have that effect. It does not take away the right of entry of the elder patentee, nor does it deprive him in all time to come of all legal remedy for the enforcement of that right, as is illustrated by the example already given; but it only affords the junior patentee a defence against any suit by the elder patentee, or those claiming under him, whilst he continues by himself or his tenants, his possession of the land by residence thereon. And it does not even fur-

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or be vacant, & the elder patentee enter, the junior patentee, cannot maintain ejectment on his previous possession of seven years.

A possession of land for 7 years, under the act of 1809, does not toll the right of entry of an elder patentee; but only gives to the junior patentee a defence against a recovery by the elder patentee or those claiming under him, whilst it continues.

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nish him with a defence against claimants having a superior title under the same grant. He cannot, therefore, upon such a possession, maintain an action of ejectment, against any person who has an elder and better title than himself. If a possession for seven years under the statute, when once had, is not a valid defence to a suit for the land brought by the elder patentee, or those claiming under him, founded upon the right of entry, although the suit may be brought after the possession by residence has been discontinued, it is perfectly obvious that the possession for seven years does not have the legal effect to divest the right of entry of the elder patentee; for if it did, he would be unable at any future time to maintain a suit upon it. But as the statute provides that the possession, to be an effectual bar to the suit, must have been continued for the term of seven years next preceding the commencement of such suit, it follows that such a possession at a previous period, and not for the seven years next preceding the commencement of the action, will not operate as a bar nor prevent a recovery by the claimant, and does not, therefore, have the legal effect to divest him of the right of entry, or to confer it upon the person who had been thus in possession for seven years. Had it not been for this peculiar provision, contained in the second section of the statute, and which, by its operation, forbids such a deduction, this Court would have been inclined to have given to a possession of seven years by residence upon the land, so far as persons claiming under adverse entries or patents were concerned, a similar effect to that which is produced upon all claimants, not laboring under any disability, by an adverse uninterrupted possession of twenty years. But when all the provisions of the statute are considered, such a conclusion cannot be arrived at, consistently with the established principles of law.

The Court therefore erred in its instruction to the jury that a possession for seven years enabled the plaintiff to maintain the action.

It has been repeatedly decided by this Court that the possession contemplated by the act of 1809, is a possession by residence upon the land. The Court therefore erred in its instructions to the jury upon this subject. Possession by improving and cultivating, and thus occupying the land, is insufficient to entitle the person thus in possession to the benefit of the act of 1809.

One of the surveys used upon the trial is not contained in the record; and it does not appear from the other testimony that the plaintiff ever had any possession within the interference between the two patents. If such be the fact, the plaintiff never had any possession of the land in controversy, and all the instructions in his favor predicated upon the existence of such a possession, were unsustained by the testimony.

Wherefore the judgment is reversed and cause remanded for a new trial and further proceedings consistent with this opinion.

Apperson for plaintiffs.

CHADAIN
vs
CARTER, &c.

A possession to be available as a defence under the act of 1809 is by residence upon the land—*argu.*

Chadoin vs Carter, &c.

APPEAL FROM THE GREEN CIRCUIT.

Gifts. Slaves. Possession.

Judge Hise delivered the opinion of the Court.

ANDREW CHADOIN, SEN., in his lifetime executed and delivered to each of his three sons, Thomas G., John W., and Andrew Chadoin, instruments in writing, dated 2d day of September, 1845, of which the following is a copy:

"For and in consideration of \$300, I have this day agreed to let John W. Chadoin have a certain negro

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DE
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boy by the name of George, about eighteen or twenty years of age. I, Andrew Chadoin, sen., is to keep said negro in my possession as long as I live, and at my death said John W. Chadoin is to take possession of said negro, and is to discount three hundred dollars out of his part of my estate. I further warrant and defend the right and title of said negro from all and every claim whatever.

"In testimony whereof, I set my hand and seal this 2d day of September, 1845.

his
 ANDREW ~~X~~ CHADOIN, Sen.
mark.

"Attest: THOMAS G. CHADOIN."

The two other instruments, executed at the same time and afterwards delivered to Thomas G. and Andrew Chadoin, are substantial copies of the above, bearing the same date, and all written by Thomas G. Chadoin, except the slaves named in each are different, and the names of the donees are different.

Under these instruments, after the death of Andrew Chadoin, sen., who died intestate, Thomas G. Chadoin and John W. Chadoin, both having qualified as administrators of the intestate's estate, and Andrew Chadoin, each took possession of the slave named in the respective written instruments which had been delivered to each of them, and claimed them as their own property.

A portion of the heirs and distributees of Andrew Chadoin, sen., deceased, there being ten in all, institute a suit in chancery for a settlement with the administrators, for a sale of the slaves and for a division and distribution of intestate's estate. In the progress of the cause, and before final decree, by amended pleadings, the question was presented, whether Thomas G., John W. and Andrew Chadoin acquired the title to the slaves claimed by them, in the manner above stated; or whether they belonged to the estate of the intestate, and were subject, with the residue thereof, to be divided amongst his heirs?

It is the opinion of this Court that no title to the slaves, whatever, passed from Andrew Chadoin, sen., deceased, to Thomas G., John W. and Andrew Chadoin, by virtue of said instruments of writing, or in any other manner, so far as shown by the proof in the cause. These slaves were not delivered to the donees in the lifetime of the intestate; nay, the writings each provide that the donor shall retain the possession during his life, and a parol gift of a slave, unaccompanied by the actual delivery of such slave, passes no interest or title whatever; so a gift of slaves not delivered, though evidenced by any written instrument except it be by will or deed duly executed, witnessed or acknowledged and recorded in due time and in the proper office, will pass *no title whatever* to the donees.—See 2d Statute Law, 1480; 7 B. Monroe, 582, *Clark's administrator vs Buckner*; 5 Dana, 307, *Howard vs Samples*; 7 J. J. Marshall, 205, *Pyle vs Maulding*.

The writings in question were not acknowledged, or proven and recorded, in the time and manner required by the statute. They could not be regarded as testamentary dispositions by the intestate of these slaves, because they were not executed, published and attested in the manner required by law to give them that effect. They were executed without consideration, as the pleadings and proof show, the parties could not hold them as advancements, and account for them at three hundred dollars, as provided in the writings, and which was not half the value of each slave, because they were not delivered or received as such during the life of the intestate.

The decree of the Circuit Court, otherwise correct in principle and detail, having been rendered in conformity with this opinion, is affirmed.

Harlan for appellant; *Craddock and Harding* for appellees.

CHADOIN
vs
CARTER, &c.

A gift of a slave, though evidenced by writing passes no title to the donor, unless possession be delivered to the donee or the instrument be properly recorded, (2 Stat. Law 1480.) 7 B. Mon. (582, 5 Dana 307, 7 J. J. Marshall 205.)

McCauley vs Offutt.**MOTION.****ERROR TO THE WOODFORD CIRCUIT.****Case 74.***Sureties. Lapse of time.***December 10.**

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

Case stated.

In August, 1838, the sheriff of Woodford county having in his hands an execution in favor of McCauley against Warren Offutt, it was replevied for three months by the defendant, who gave Hillery Offutt and Elizabeth Offutt, as sureties in the replevin bond.

In the month of December, in the same year, an execution issued upon the replevin bond, for the sum of three thousand four hundred and thirty seven dollars, eighty seven cents, with interest thereon, at the rate of six per centum per annum, from the 20th day of August, 1838, and the cost, which was on the 4th day of February next following, returned by the sheriff, "stayed by order of the plaintiff, and consent of the sureties. See order and consent herewith returned."

The order of the plaintiff, and the consent of the sureties, referred to by the sheriff in his return read as follows:

"The sheriff of Woodford county, will stay an execution in his hands in my favor, against Warren Offutt and others, upon the written legal consent of the parties to the execution being produced to him."

Lexington, February, 1st, 1839.

J. M. McCAULEY.

"We hereby consent that an execution on replevin bond, now in the hands of the sheriff of Woodford county, upon a judgment of said Court, against Warren Offutt, in favor of John McCauley, may be stayed, for any period of time, the said McCauley, may direct. Witness our hands and seals, this 2nd day of February 1839."

HILLERY OFFUTT.
ELIZABETH OFFUTT.

McCauley
 Cr. v. r.

No execution was subsequently issued upon the replevin bond, until the 7th day of January, 1851, on which last mentioned day, one was issued, against Warren Offutt and Hillery Offutt, survivors of Eliza, both Offutt deceased, and, having been placed in the hands of the sheriff, was by him levied upon, the property of Hillery Offutt, the surviving surety in the replevin bond.

Thereupon Hillery Offutt, notified the plaintiff in the execution, that he would on the second day of the next term of the Woodford Circuit Court, move said Court, for an order, directing the clerk of the Court, to make an endorsement upon the execution, then issued, and upon every subsequent execution that might issue upon the replevin bond, to the effect, that the plaintiff in the motion was released, as one of the sureties in said bond, because of the failure of the payer to sue out execution thereon for more than twelve months after one was due him.

The motion having been made in pursuance of the notice, the Court decided that the surety in the replevin bond was released by the failure of McCauley, to sue out an execution for so long a period, after the return of the first one, and ordered the clerk to make an endorsement to that effect upon the execution, which had issued, and upon every execution that might be afterwards issued upon said replevin bond.

The statute, (*see 1 Stat. Law 745*), makes the failure of a plaintiff in a replevin bond, for the space of twelve months, after execution is due him, to issue an execution thereon, with a view, *bona fide* to the collection of his debts, operate as an absolute discharge of the surety in the bond.

Did the sureties in this case when they executed the writing herein set forth, intend to waive this legal right, if by subsequent events they should become entitled to it, or can the writing according to its true import, be construed as an assent upon their part, to an indefinite postponement of the collection of the debt, to be regulated by the mere will of the creditor?

**McCAULEY
vs
OFFUTT.**

A consent by a surety in a replevin bond, "that an execution then in the hands of the sheriff on replevin bond may be stayed for any period of time the plaintiff may direct—does not have the effect of continuing the liability of the surety, after the lapse of 12 months from the return of the execution in the hands of the sheriff—the plaintiff having fixed no time for the stay, but only directed the sheriff to return the execution then in his hands upon the sureties giving consent.

It is evident from the terms of the writings, that the plaintiff in the execution, had a right to issue another execution immediately upon the return of the one in the hands of the sheriff. He had not agreed to suspend the collection of his debt for any certain or definite period of time. He only directed a stay of the execution then in the hands of the sheriff, provided such a stay was assented to by the defendants in the execution. They gave their assent as required, and the legal effect of the arrangement was to suspend all further proceedings upon that execution, and to authorize the sheriff to return on it, that it had been stayed by the order of the plaintiff. But so far as the plaintiff was concerned, he was under no obligations, and had entered into no agreement to suspend the collection of his debt, for a single day, after the return day of the execution in the hands of the sheriff.

But it is contended, that by the terms of the writing executed by the sureties, they consented that the plaintiff in the bond might suspend the collection of his debt, at his pleasure, to any indefinite period of time, and having entered into such an agreement, they are estopped by it, from relying upon the statutory release.

By a fair and liberal construction of the writing executed by the sureties, it imports, not merely an assent on their part, to a stay of the execution then in the hands of the sheriff, but to a further suspension of the collection of the debt, for any period of time the plaintiff might direct. The language used, clearly indicates that some other period of time was contemplated, than that embraced by the execution referred to, which had then only about ten days to exist. But, although they gave their assent to further indulgence by the plaintiff, after the return day of the execution, it was done only in the form of a proposition, which being conditional, was similar to the proposition made in the first instance by the plaintiff himself to stay the execution, and was not obligatory until acceded to by the opposite party. The proposition was, that the sureties would consent

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vs
OFFUTT.

to a stay of execution, or in other words to a suspension of the collection of the debt for any period of time the plaintiff might *direct*. The plaintiff did not respond to the proposition, he did not *direct* a stay of execution for any specified period of time. Consequently there was no agreement made by the parties, for any other suspension of the collection of the replevin bond, than that which was produced by the stay of the execution then in the hands of the sheriff. It would be unjust and unreasonable, to give an effect to a proposition made by the sureties, which had not been answered or acceded to, by which they would be held liable for the debt, leaving it discretionary with the creditor, to give indulgence on the debt, or to enforce its collection, at his own option. Such an arrangement would be destitute of all reciprocity. The obligation would all be upon one side, without any corresponding obligation upon the other. The creditor did not bind himself to postpone the collection of his debt for any period of time. The sureties were willing that he should do it; but the parties came to no understanding upon the subject. As the creditor retained his right to enforce the collection of the debt, so the sureties retained their right to avail themselves of the statutory release if he failed to do it, for a period of time exceeding twelve months.

As the statute, gives to sureties in replevin bonds an absolute discharge from all liability upon such bonds, where the creditor has failed for a year to sue out execution, with a view to a collection of the debt, any assent upon their part, that the creditor may suspend the collection of his debt, should not be construed to deprive them of the right to avail themselves of this statutory advantage, when it does not appear, either expressly or by implication, that they agreed to waive it, or assented to a suspension of the collection of the debt, for a period of time, from the expiration of which twelve months had not elapsed, before the creditor had by execution, proceeded to enforce the collection of his debt.

McCULEY

vs

OFFUTT.

Held farther that as no execution issued from 1838 to 1851, that the surety was released from liability more than 7 years having elapsed.

In our opinion therefore, the failure of the creditor to sue out an execution on the replevin bond, from the year 1839, until the year 1851, had the effect to release the sureties, both under the statute, prescribing twelve months, and the statute, which makes seven years operate as a discharge. By any construction, even the most favorable to the creditor, that can be given to the writing executed by the sureties, it does not import an assent that indulgence may be extended by the creditor, beyond a reasonable time. If the terms used in the writing, were calculated to lull the vigilance of the creditor, they did not justify, the unreasonable negligence, which was manifested in the collection of the debt.

There was no error in overruling the motion for an injunction against the prosecution of the motion by the sureties, upon the bill exhibited by the creditor. The bill did not contain any equity, nor set forth any other facts than those which appeared upon the trial of the motion. And for the same reason the application for a continuance founded upon the matters stated in the bill, was properly disallowed.

Wherefore the order is affirmed.

M. Brown and Kinkead, for plaintiff; *Smith and Porter*, for defendant.

Hart and Evans vs Soward.

APPEAL FROM THE MASON COUNTY COURT.

Administration.

JUDGE MARSHALL delivered the opinion of the Court.

THIS case presents a contest for administration between the surviving husband and a brother and brother-in-law of a deceased *feme covert*, who died intestate and without near kindred. Under ordinary circumstances such a contest would probably never arise, as the 29th section of the act of 1797, (*Stat. Law*, 661,) directs the County Court to grant administration to the representatives who apply, "*preferring first the husband or wife*, and then such others as are next entitled to distribution, or one or more of them as the Court shall judge will best manage and improve the estate."

The fact relied on as distinguishing this from other cases is, that before the marriage of Alfred Soward with the decedent, who was a widow possessed of considerable estate, real and personal, they entered into a marriage contract, which was duly recorded; whereby, in contemplation of the intended marriage, it was agreed between them "that the said Margaret Gorsuch (the decedent) shall hold and possess, for her own separate and exclusive use and benefit, all the estate, real, personal and mixed, now owned and possessed by her, and the future rents, issues and profits thereof, free from the control or disposition of the said Alfred Soward. It being intended that the said Margaret Gorsuch shall hold the said property as her separate estate, and in the same manner as if she was sole and unmarried, she hereby retaining authority and power to dispose of the same in such manner as she may choose in her lifetime by sale and conveyance or by last will and testament."

MOTION.

December 11.

Case 75.

Case stated.

HART & EVANS
vs
SOWARD.

A wife by anti-nuptial contract reserved her property real and personal, with the issues and profits to her separate use, as well as the right to dispose of it by sale or will, she died without disposing of it—held that the husband had the right to administration upon her estate, *Williams on Executors*, 244 *Tyler's law of Executors*, 84 5 11 *B. Mon.* 138, (*stat. law* 661.)

It is contended that by the terms and legal effect of this writing, the husband was deprived of all right and interest which the law would otherwise have given him in the estate of his wife, as well after as before her death, and that as the husband's right to administer on the estate of his wife, in preference to all others, is founded upon his interest in her estate, when that interest is absolutely renounced by his own act as a party to an antenuptial contract, the basis of his right ceases, and the administration must be granted to some one or more of those who may be entitled to distribution. On the other hand, it is contended that whatever may be the ground of preference for the husband, that preference being declared by the statute expressly and unequivocally his right to administer cannot be denied, even if upon the death of his wife he should, in consequence of the antenuptial contract, have no interest in her estate; and it is also contended that the wife never having disposed of her estate during her life, the husband's interest, after her death, and his right to administer, if dependent on interest, are not affected by the antenuptial contract.

The statute seems to intend that administration shall be granted to some one interested in the estate, and probably founds its preference for the husband upon the assumption that he is thus interested. The 28th section, which directs distribution of the personalty of an intestate, declares expressly "that nothing in the act contained shall be so construed as to compel the husband to make distribution of the personal estate of his wife dying intestate." This declaration, coupled with the absolute preference of the husband as administrator, does in fact give to him or recognize in him a right to such personal estate of his deceased wife as being otherwise undisposed of, is at her death left to the disposition of the law. If the husband, as administrator, be not compellable to carry out such dispositions of the wife's estate as exempted it from the distribution prescribed by law, there would be much reason for saying

that the existence of a valid disposition of the estate, independent of the law directing distribution, should constitute a reason for not granting administration to the husband, by which such disposition would be defeated. But the existence of such a valid disposition would in fact take the estate out of the operation of the statute of distributions, and out of the declaration in favor of the husband, quoted from the 28th section. And as such a disposition of the estate would be binding upon him as upon any other administrator, it would furnish no imperative, and perhaps no sufficient, reason for withholding the administration from him against the letter of the statute.

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VS
SOWARD.

In *Williams on Executors*, page 245, the doctrine is laid down, upon the authority of the cases referred to, that if the wife executes a general power by disposing of her whole estate, the husband is barred of his right of administration; that her execution of a partial power extending to a part of her estate will bar him only *pro tanto*, and he is entitled to administer the residue; and that if she executes her power of disposition by will, but makes no executor, the husband is entitled to administer with the will annexed. From which, it is clearly to be inferred, that it is not the existence of the power, but its execution, that bars the husband, and that he is barred only so far as the power is executed. In *Toller on Executors*, page 84-85, the same principles are found as in *Williams*, and one of the cases referred to, was upon an antenuptial agreement under which the wife had exercised the power of disposition by will. But administration was granted to the husband as to things not thus disposed of.

In the case of *Bray vs Dudgeon*,* in which the Supreme Court of Virginia decided that the nephew of the intestate's wife was entitled to administration in preference to the husband, the antenuptial settlement had not only given to the wife the power of disposition by will, but provided that if not thus disposed of, it should be conveyed to her proper legal heirs; so that it

(*6 Munf. 182;
Ward vs Thompson,
6 Gill and
Johnson, 349.)

HART & EVANS
vs
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was not left for distribution by law, in case of her intestacy, but was disposed of by the original settlement; and the surviving husband had no possible interest in it. In this case there was no disposition of the wife's estate to take effect after her death, either in the antenuptial agreement or under the power therein reserved. And therefore the Virginia decision, though probably made under a statute similar to ours, can have no direct application to this case, where the wife's estate was upon her death left wholly to the disposition of the law. In the case of *Payne vs Payne* 11 B. Monroe, 138, where estate, real and personal, had been devised for the separate and exclusive use of the wife, it was decided by this Court, that if the death of the wife terminated the trust, the surviving husband was entitled to the personal estate as administrator. And as the mere fact that the estate of the wife has been secured to her separate use, with a power of disposition which has not been executed, does not of itself deprive the husband of his right to administer, we are of opinion that he was not bound by the antenuptial agreement, or by the power reserved in it, which being unexecuted, left her estate to the disposition of the law.

Wherefore, the order appointing Alfred Soward administrator of the estate of his deceased wife, is affirmed.

Payne and Hord for appellants; *Taylor and Waller* for appellees.

Yantes vs Smith.

ERROR TO THE GARRARD CIRCUIT.

Assignment. Supersedeas bonds.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

THIS action of debt was brought by Smith, against Yantes, on a supersedeas bond, executed by the latter, as surety. The bond is in the penalty of one thousand dollars, and contains the usual condition. The defendant filed several pleas, all of which rely substantially upon the same matter of defence. In these pleas it is admitted, that the decree in favor of Smith, to supersede which the bond had been executed, had been affirmed by the Court of Appeals, but it is alledged that after the affirmance and before the commencement of the present suit, the bond sued on had been sold and assigned away by the plaintiff, who had no right or title to it. The pleas were demurred to by the plaintiff, the demurrers sustained, and a jury having been dispensed with by the agreement of the parties, a judgment was rendered for the plaintiff, and the defendant has prosecuted a writ of error to reverse it.

The only question to be determined, is, whether a supersedeas bond is assignable under the statute, so that the title and right of action by the assignment is transferred to the assignee.

It was decided in the case of *Anderson vs Bradford*, (5 J. J. Marshall, 69,) that a replevin bond was not embraced by the statute, and was not assignable.

A supersedeas bond, is taken by the clerk of the Court, and has by law to remain in his office. It cannot pass from hand to hand, and if it be made the subject of transfer, it must be done, by a writing executed upon a separate paper, which becomes the substitute and representative of the real subject of the transfer.

DEBT.

December 13.

Case 76.

Case stated.

A replevin bond is not assignable (5 J. J. Marshall, 69.) A supersedeas bond is not embraced by the statute of assignments and cannot be assigned to authorize a suit in the name of the assignee.

YANTES
vs
SMITH.

It is not properly speaking a bond for money, but only secures the payment of money, in the form of unascertained damages, upon a contingency, which may never occur. Its assignment cannot have the legal effect, to transfer, to the assignee, the title, to the judgment or decree, the payment of which it is intended to secure. An execution upon such judgment or decree, would still have to issue in the name of the party in whose favor it was rendered. If the title and right of action pass to the assignee by an assignment of the supersedeas bond, the strange anomaly would be presented, that the legal title of the judgment or decree secured, by the bond remained with the assignor, although the legal title to the bond itself passed to the assignee. The opinion of the Court is, that a supersedeas bond is not embraced by the statute, and that its assignment does not transfer the right of action to the assignee.

The plea which alleges that the assignment was made to Richard M. Robinson, does not present any other matter of defence than the fact of the assignment. It does not allege that the assignee is the same Richard M. Robinson, against whom the decree was rendered, which was superseded by the bond, or that he was beneficially interested in the assignment made to him, or that it was of such a character as to operate as an extinguishment, or equitable satisfaction of the demands secured by the supersedeas bond. The demurrer to this plea, as well as to the others was therefore properly sustained.

Wherefore the judgment is affirmed.

Turner and Burton, for plaintiff; *Rice and Burdett*, for defendant.

Brandenburg vs Flynn's Administrator. CHANCERY.**ERROR TO THE ESTILL CIRCUIT.***December 15.**Sureties. Contribution.**Case 77.*

JUDGE MARSHALL delivered the opinion of the Court.

Case stated.

AN execution in favor of David Brandenburg against O. Tracy having been replevied by Tracy, with Hulse and Joseph Brandenburg as his sureties, was afterwards enjoined by Tracy on a bill in equity, in which he made his two replevin sureties defendants. M. Flynn was the surety in the injunction bond. The injunction was dissolved with damages, and Tracy in the meantime having become insolvent and conveyed his property to be applied to payment of his debts, M. Flynn or his administrator was compelled to pay the judgment on the injunction bond, including the amount due on the replevy bond with costs and damages. The present bill, filed by Flynn's administrator, seeks to make the sureties in the replevy bond, of whom Joseph Brandenburg alone is now solvent, reimburse him, or contribute to his reimbursement, for the payment thus made. The bill also alleges that the executors of David Brandenburg, the original creditor, had received more than \$100 under a decree distributing the proceeds of Tracy's property conveyed as above mentioned, and that said sum should go, or should have gone, to the credit of the debt on the replevy bond; and he prays a decree for the amount against said executors who are made parties. It appears, however, that within two months after the bill was filed, and before the executors were served with process, the sum referred to, which had not actually come to the hands of the executors, but had been received by another for them, was paid to the complainant, and it does not appear that it ever was refused.

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BRANDENBURG
vs
FLYNN'S
ADM'ISTRATOR.

Before the injunction was obtained by Tracy an execution on the replevy bond had been levied on his land and other property, the sale of which was directed by the creditor to be postponed until further orders, and in two months afterwards, and before a sale was made, the execution was stayed by the injunction. It was agreed as a fact in this case, that at the date of the the injunction, Tracy's property was sufficient to pay the debt.

On the hearing, the Court decreed that Joseph Brandenburg should pay to the complainant \$74 with interest, and the costs of the suit, and there was no decree against Hulse. To reverse this decree, Joseph Brandenburg prosecutes a writ of error, claiming that the bills should have been dismissed as to him, and the complainant by cross error complains that the decree is erroneous in not fully reimbursing his payment of the replevy bond, &c., and also in not decreeing costs against the executors of David Brandenburg.

A surety in an injunction bond enjoining a judgment which had been replevied, has no claim upon a surety in the replevy bond, for contribution after payment of the debt, when he became surety in the injunction at the instance of the principal alone, and not the surety in the replevy bond.

A surety in a replevy bond is not a co surety with a surety in an injunction bond, and is not liable to contribution to him.

The complainant's claim seems to be based upon a wrong application or improper extension of the principle that when a surety pays the debt he is entitled to the benefit of such securities for it as the creditor held, or else upon the principle that the surety in the injunction bond was substantially but a co-surety with the sureties in the replevy bond which was enjoined and entitled to contribution from them, or upon the idea that the injunction surety was the surety not only of principal but also of the sureties in the replevy bond. The decree was probably founded upon the idea that, all being substantially sureties for the same debt, all should be regarded as co-sureties, and therefore that any one who, by the insolvency of the principal, has been compelled to pay, may require the others, or such as are solvent, to contribute so as to equalize the loss.

It is not even alleged that Flynn became bound in the injunction bond at the request of either of the sureties in the replevy bond, or that the injunction was obtained at their instance or with their assent. And it

is certain that it operated to their injury by prolonging their responsibility and subjecting them to hazard from which they would otherwise have been relieved by the sale of the property of their principal, then under levy for the purpose. There is no pretence for saying that Flynn was surety for them. And although he made himself conditionally responsible for the same debt for which they were bound, yet, as his obligation is conditional, while theirs is direct, as his obligation is more extensive than theirs, as it was entered into not only after the date of theirs but obviously in aid of the principal alone, for a purpose in which they did not concur, and with the probable effect of injury to them, he cannot, as we think, be regarded in any just sense as a co-surety with them. It is for the purpose of doing equity that the chancellor regards all persons who are bound, though by different instruments executed at different times, for the same debt or duty of the same individuals, as co-sureties bound to contribute to any loss which either may sustain. The facts of this case prove that the application of the principle here would be inequitable. But the particular facts of this case are not necessary to take it out of a rule which might otherwise embrace it. We know of no case in which, on the ground either of contribution among co-sureties or of substitution to the securities of the creditor, a subsequent surety coming in aid of the debtor alone, without the request or concurrence of the original sureties, and in the regular course of the remedy for coercing the debt from him alone, or for the purpose of obstructing its collection by his own separate proceeding and for his own benefit, has obtained in equity either partial or full reimbursement from the prior sureties.

On the contrary, the doctrine established by the adjudged cases, and as we think in conformity with the true principles of equity, is that, if under such circumstances the prior surety is compelled to pay the debts, he thereby becomes entitled by substitution to the rights of the creditor against the subsequent surety to the

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On the contrary the prior surety has a right to be substituted to the right of the creditor against the subsequent surety to the full amount which he may be com-

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pelled to pay.—
Parsons vs Briddock, 2 Vernon,
603; 5 Dana, 244;
2 B. Mon. 305;
12 *ibid.*

whole extent of the payment made and of the obligation of the subsequent surety. Which precludes all right on the part of the subsequent surety, should the debts be coerced from him, to claim reimbursement from the prior surety. The cases of *Parsons vs Briddock*, (2 Vernon, 603;) *Patterson vs Pope*, (5 Dana, 244;) *Kouns vs Bank of Kentucky*, (2 B. Monroe, 305;) *Bohannon vs Combs*, (12 B. Monroe;) and other cases, establish or recognize the doctrine above stated, and sufficiently illustrate the principles on which it rests, and its applicability to the present case. We content ourselves, therefore, with the conclusion, that on principle and on the authority of the cases referred to, the complainant was entitled to nothing against either of the sureties in the replevy bond, but the bill as to them should have been dismissed. And, as there appears to have been no necessity for bringing the executors of David Brandenburg before the Court for the purpose of compelling payment of the sum received from the assets of Tracy on account of this debt, and which the complainant received before service of process, the cross errors assigned by Flynn's administrator are wholly unavailable.

Wherefore, on the writ of error of Joseph Brandenburg, the decree is reversed, and the cause remanded, with directions to dismiss the bill with costs.

Huston & Hanson for plaintiff; *Smith* for defendant.

Craig vs Gresham.**CHANCERY.****ERROR TO THE ROCKCASTLE CIRCUIT.****December 16.***Sureties.***Case 78.****CHIEF JUSTICE SIMPSON** delivered the opinion of the Court.

Two questions arise in the case presented by this record:

First: Does the fact that an execution has been issued and returned 'no property found' on a judgment, where one of the defendants is principal, and the other is merely a surety, excuse the failure of the creditor to sue out another execution, during a period of more than seven years, and take the case out of the operation of the statute of 1838? We decide that it does not have that effect. It does not come within the excepted cases mentioned in the statute, nor is there any good reason why it should have the effect contended for. The principal debtor may have had no property when the first execution issued, but a subsequent execution within the prescribed period, if issued, might have been satisfied, out of property subsequently acquired by him, and thereby relieved the surety from his responsibility.

The return of an execution against principal and surety "no property found," does not relieve the plaintiff from the consequent release of the surety, if he fail to issue other execution within seven years, under the statute of 1838.

Second: Shortly after the execution upon the judgment was returned 'no property found,' the creditor exhibited a bill in chancery to enforce a vendor's lien upon a tract of land, and in that way to obtain satisfaction of the judgment at law, which was obtained on a note executed for the purchase money, and in that suit in chancery, which was still pending when this suit was tried, the principal debtor had resisted the relief prayed for, and insisted upon a rescission of the contract. The question then is, whether the creditor, in consequence of the pendency of the chancery suit, and the resistance made by the purchaser to the relief sought by him, is excused for his failure to sue out another execu-

Nor will the pendency of a suit by the creditor to enforce the vendor's lien to satisfy the debt, which is resisted by the debtor and a rescission claimed, excuse the creditor from the consequence of release of the surety if he fail to sue out execution for seven years, under the statute of 1838.

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tion upon his judgment at law. By the provisions of the statute, the surety is discharged when seven years shall have elapsed without execution upon the judgment, unless delayed by dilatory proceedings on the part of the defendants. The dilatory proceedings alluded to, are such as deprive the creditor of the right to issue an execution upon the judgment. If such right exist, notwithstanding a controversy may be pending in reference to the ultimate liability of the debtor for the amount of the judgment at law, still, as the creditor can issue an execution, it cannot with any propriety be said that he is delayed in having execution of his judgment by any dilatory proceedings on the part of the defendants, and the statutory bar applies.

Wherefore, the decree of the Court below is affirmed.
Lindsey for plaintiff; *Haley* for defendant.

CHANCERY.

Renfroe's Heirs vs Taylor.

December 17.

ERROR TO THE MADISON CIRCUIT.

Case 79.

Descents. Dower. Infants' real estate.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

Case stated.

IN 1833 John Renfroe died intestate, leaving an only child, named William, who was an infant, and who subsequently died unmarried and without issue, before he attained the age of twenty-one.

John Renfroe, the father, at the time of his death was the equitable owner of a tract of land containing about one hundred and ten acres, the legal title to which was in the heirs of James Haggin, deceased. This tract of land, upon the death of the father, de-

scended to his son William, who, at the time of his death, during his infancy, had a mother, but neither brothers nor sisters, living, never having had either brother or sister. His paternal grandfather, as well as his father's brothers and sisters, were also alive. His mother, with whom he resided, continued in the possession of the tract of land during his life. After his death, she still continued in the possession of it for some years, and having obtained from the paternal grandfather of her deceased son a conveyance of all his right and title to it, she subsequently, in conjunction with her husband John Land, with whom she had intermarried after the death of her first husband, sold and conveyed it to Franklin Taylor, and gave him the possession of it.

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This suit in chancery was instituted in 1850 by the brothers and sisters of John Renfroe, the father, asserting a right to said land, as the heirs at law of the infant William Renfroe, and praying a decree against Haggin's heirs, whom they made defendants for a title, and against the widow and her vendee, Taylor, for the rents and profits and a surrender of the possession of the land.

The right of the complainants to the infant's real estate depends upon the construction of the 5th section of the act of 1794, to reduce into one the several acts directing the course of descents.—(1 *Statute Law*, 563.) In that statute it is enacted that "where an infant shall die without issue, having title to any real estate of inheritance, derived by purchase or descent from the father, the mother of such infant shall not succeed to, nor enjoy the same, nor any part thereof, if there be living any brother or sister of such infant, or any brother or sister of the father, or any lineal descendant of either of them, saving, however, to such mother any right of dower which she may have in the said real estate of inheritance."

The question for decision, & statute on which it depends.

In opposition to the complainant's right, it is contended that the whole effect of the 5th section, is upon the contingencies mentioned, to exclude the mother, as

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heir, and the estate is left to descend according to the rules of inheritance prescribed by the statute, as it would do if no mother was living. The argument is, that this section does not declare who is to inherit the estate, but only excludes the mother, and as it fails to designate the persons to whom the inheritance is to be transmitted, this must be ascertained by reference to the other sections of the statute. And as the mother is expressly excluded, the estate must descend as if there was no mother nor brother nor sister, nor their descendants, and under the 7th section be divided into two moieties, one of which will go to the paternal, and the other to the maternal kindred, and that as in this case there was a paternal grandfather living, the uncles and aunts on the father's side were not entitled to any part of the inheritance.

Though the 5th section of the act of 1796 (1 Stat. Law, 563.) does not expressly declare that the persons therein named, upon the exclusion of the mother, shall inherit an infant's real estate, yet it is necessarily implied that the brothers and sisters, and others named, shall inherit on the exclusion of the mother.

The 5th section of the statute does not expressly declare that the persons therein named, upon the exclusion of the mother, shall themselves succeed to the inheritance, but such seems to be the necessary and inevitable implication arising out of its provisions. By the rule of inheritance adopted by the Virginia statute of 1785, and which, with the exception introduced by the 5th and 6th sections, is the rule which regulates the transmission of real estates of inheritance under our statute of 1796, the mother would inherit the estate in contest. But this section excludes the mother, upon the ground that the son derived the estate from the father. Following out the principle upon which the exclusion of the mother is founded, the estate, in the event that there are no brothers nor sisters of the infant, nor their descendants, should be transmitted to the kindred on the side of the father. The brothers and sisters of the father are therefore mentioned as the persons who are to exclude the mother, and must necessarily be regarded as being substituted in her place, and entitled to the estate, which would have passed to her, had she not been excluded. The interpretation of this section, by which the mother is excluded, and the gen-

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eral rule of descents established by the statute is applied in giving direction to the transmission of the infant's estate, would defeat the operation of the principle upon which the exclusion of the mother evidently rests. One moiety of the estate would pass to the maternal kindred, although the mother herself cannot inherit it, and she would, although living, be superseded, that a moiety of the estate might be transmitted to kindred on the same side, that were more remote. Such a result was not contemplated by the Legislature, and would be entirely inconsistent with the object and design intended to be accomplished by the exclusion of the mother. As the estate was derived from the father, the design was, if the infant died without issue, leaving no brother or sister, or lineal descendant of either, to confine the succession to the kindred on the part of the father, if any of his brothers or sisters, or any lineal descendant of either of them, should be living. This object is attained by the construction which regards the 5th section as virtually, and by necessary implication, designating the persons named as being entitled to the succession; and this construction is fortified by the consideration that no other part of the statute points out the direction which is to be given to the estate, during the lifetime of the mother, for it is only where there is no mother living that it directs the estate to be divided into two moieties, one to go to the paternal and the other to the maternal kindred. If none of the persons described in the 5th section are alive, and capable to take the inheritance upon the death of the infant, the mother is not excluded, and under the operation of rules of descent established by the statute, would inherit the estate. The 7th section, therefore, which divides the estate into two moieties, and directs its disposition, can have no effect or operation during the lifetime of the mother, and consequently the present case is not provided for by the statute, unless the 5th section itself is construed as directing the course of the descent of the inheritance, and as transmitting it to the

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brothers and sisters of the father; and such is the construction that we give to it.

A similar construction was given by the Supreme Court of the State of Virginia, to their statutes regulating descents, in the case of *Templeman vs Sleptos*, (1 *Munford*, 339,) in which the same question was presented and considered, having arisen upon the statute of 1785 as amended by the statute of 1790, from which latter statute the 5th section of the statute of 1796 seems to have been transcribed.

The same construction was given to the statute by this Court in the case of *Scroggin vs Allin, &c.*, (2 *J. J. Marshall*, 466.) But as the decision of that case turned upon the question of the chancellor's jurisdiction, and was not made to depend upon the construction of the statute, it was not regarded, in the argument of this case, as having authoritatively settled the question.

But in the case of *Gill's heirs vs Logan's heirs*, (11 *B. Monroe*, 234,) a similar construction was given to the 6th section of the statute, in reference to the real estate of an infant, derived by descent from the mother, in which case it was decided, that upon the death of the infant, it passed by descent from him to the brothers and sisters of his mother, and his relations upon his father's side were not entitled to any part of it. No argument, it is true, was used in that case, to prove the correctness of the construction given to the statute, but its construction was determined as if its meaning had been so obvious as not to require discussion, and we still think that the construction is proper, and that it is the only one of which the statute is reasonably susceptible.

The mother is entitled to dower in the real estate of infants, descended from the father; nor is she barred by having purchased from the grandfather of the infant, upon the death of the latter, sup-

The mother's right of dower in the infant's estate of inheritance, derived from the father, is expressly saved by the statute. The complainants, however, contend, that by purchasing and obtaining a conveyance to the land from the paternal grandfather, and then claiming and holding it as her own, she assumed an attitude hostile to the heirs at law, and has precluded herself from

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posing him to be the heir at law. Neither a widow or her tenant is bound for rents for the occupancy of the mansion, and until dower be assigned.

asserting a claim to dower in the land. To sustain this position, a reference is made to the principle of law by which, when the widow consents to an act inconsistent with her right to actual endowment, she is bound by her consent, and barred of her legal title. By attending to the doctrine upon this subject, however, it will be perceived that it applies to cases where the widow agrees to accept an interest in the dowerable estate, which is inconsistent with her title to dower in that estate, as where she accepts from the heir a lease for life for the whole of her husband's freehold estate; since, in such a case, she cannot claim dower out of the estate, without partially defeating the lease, she will be barred of her dower. But here the widow took no right or interest in the estate by the conveyance from the paternal grandfather, and therefore done no act inconsistent with her right to dower. She supposed that she had obtained the title from the person who was heir at law, and had she done so, her right to dower would have merged in the fee simple title. But her mistake cannot deprive her of her legal right to dower, inasmuch as that right is the only one with which she has been invested. And as her husband resided upon the land at the time of his death, and she had a right to remain in the mansion house, and retain possession of the plantation thereto belonging, rent free, until dower was assigned her. we are of opinion that she is not only entitled to dower, but that she has a right to retain the premises until her dower was assigned her; and as the complainants, who are the heirs at law, have never had her dower assigned, nor offered to do it; that neither her nor her vendee is liable for any rents.

The complainants had a right to a decree against Haggin's heirs for the title. The bond executed by Haggin states that the purchaser had executed his notes for the purchase money. As the notes are not produced, and more than twenty years have elapsed since the sale was made by Haggin we regard the evidence in the cause, taken in connection with these cir-

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circumstances, as sufficient to prove the payment of the purchase money.

The Circuit Court having dismissed the complainants' bill, the decree is erroneous.

Wherefore, the decree is reversed, and cause remanded for further proceedings consistent with this opinion.

Turner for plaintiffs; *Breck and Monroe* for defendants.

ASSUMPSIT.

Northcut's Administrator vs Wilkinson.

December 18.

APPEAL FROM THE CASEY CIRCUIT.

Case 80.

Assumpsit. Limitation. Executors and Administrators.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

Case stated.

THIS was an action of assumpsit by Wilkinson against the defendants, as administrators *de bonis non* with the will annexed of Archibald Northcut, deceased.

The action was brought on an account for work and labor performed by the plaintiff for the defendant's testator in his lifetime.

After the death of the testator, Sally Northcut qualified as executrix and William Northcut as executor of his last will and testament. They both died, and after their death, the defendants were appointed administrators *de bonis non*, with the will annexed.

The statute of limitations was plead as a bar to the plaintiffs' action, and to take the case out of the operation of the statute, he relied upon a promise to pay the demand, made by Sally Northcut the executrix, within five years, on which promise one of the counts in his declaration was founded.

The question, therefore, presented for the consideration of the Court is, whether the promise relied upon was sufficient to relieve the case from the statutory bar. The question was decided in the affirmative, by the Court below, and we are of opinion the decision was correct.

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In the case of *Hord's administrator vs Lee et al.*, (4 *Monroe*, 36,) it was held that a promise by one of two administrators, was sufficient to take the case out of the statute, and to maintain the action against both the administrators. The doctrine is based upon the assumption that an administrator or executor represents the the decedent to the extent of the assets in his hands, and that a promise made by him, in his representative capacity, to pay a debt, should have the same effect as if it had been made by the intestate or testator himself, and if there be several, that they represent one individual and one fund, and the act of one in most cases is regarded as the act of all.

A promise by one executor to pay the debt of the testator, is sufficient to do away the effect of a bar by limitation and authorize an action against two executors or administrators. Or an action against an administrator *de bonis non*, in case of the death of the executor or administrator. (4 *Monroe*, 36; 16 *Mass. Rep.* 429; *Angell on Lim.* 278.)

From these principles, it would seem necessarily to result, that as the estate was made liable by the promise of the executrix in her lifetime, that her death could not affect the liability, but the estate unadministered would remain subject to the demand in the hands of the defendants as administrators *de bonis non*.

This question was so decided by the Supreme Court of Massachusetts in the case of *Emmerson vs Thompson*, (16 *Mass. Rep.* 429,) and the doctrine is recognized as correct in *Angell on Limitations*, 278.

Wherefore, the judgment is affirmed.

Stuck for appellant; *Fox* for appellee.

ON. PETITION

King vs Shanks.

December 19.

ERROR TO THE LINCOLN CIRCUIT.

Case 81.

Slaves. Case. Bailment.

JUDGE MARSHALL delivered the opinion of the Court.

Case stated.

THIS petition (filed under the new Code of Practice) claims to recover from Shanks the value of the plaintiff's slave Berry, alleged to have been induced, persuaded and hired by the defendant, without the authority or permission of the plaintiff, to ride and swim the defendant's horse in a certain deep and dangerous pond, &c., whereby the slave was drowned. The answer of the defendant denies the allegation as made, but says he offered to give Berry twenty-five cents to have his horse swum, and Berry said he would do it for twenty-five cents, and some one present remarked that Berry could not swim, and defendant then told him if he could not swim not to attempt to swim his horse; but the slave, not regarding defendant's command, admonition and advice, forced the horse into the pond and attempted, without the direction or request of the defendant, to duck the horse, and in doing so was thrown, or got off the horse, and was drowned. The defendant also states that Berry was in the habit of hiring himself to do jobs, &c., and also of trading for himself, by the permission of his master.

The affirmative matter of the answer was traversed by the plaintiff, except as to the alleged attempt of Berry to duck the horse; and the law and facts having been submitted to the Judge, he was of the opinion that the drowning of Berry did not proceed immediately from the inducement held out by Shanks for him to swim the horse, but resulted from the voluntary attempt of Berry to duck the horse, and on this ground rendered a judgment for the defendant.

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The substance
of the proof.

The evidence conduced to prove that the slave Berry had, with the knowledge of the plaintiff, his owner, made some trades and acquired some little money and property, there being, however, no direct evidence of the plaintiff's knowledge of these facts. There is no proof that he had been in the habit of hiring himself to do jobs, &c., nor of any single act of that kind. But from his having acquired a little money, &c., and from his alacrity on the occasion now in question, it is highly probable that he had done little services for a compensation to himself, as is frequently the case with slaves. Whether these circumstances, and the prevalence of such a practice among slaves, would be sufficient ground for inferring that he had a general license from his master to engage in these little services for his own profit, when not actually employed in the service of his master, it is not necessary to inquire. The fact that he had habitually, or even occasionally, undertaken jobs for his own profit, without special license, or indeed at all, is itself but matter of inference. His master's knowledge and sanction of such a practice is only to be inferred by the assumption of the first inference. And even if it could be assumed, upon the ground of these vague inferences, that Berry's master allowed him to engage in little services of an ordinary kind for his own profit, it could not be assumed, in the absence of all proof on the subject, that Berry had any license, express or implied, to engage even on Sunday, which was the day on which this transaction occurred, in services of an extraordinary and hazardous character. It is in proof that his master had refused to hire him where he would be exposed to water, in consequence of the danger of his being drowned. And it cannot be safely inferred, that if he had been present, he would have consented that Berry should ride the defendant's horse into the pond for the purpose of swimming him. On the contrary, it may be assumed, that if Berry could not swim himself, his master would not have permitted him to swim the horse.

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From the fact that a master occasionally permitted his slave to do jobs for his own profit, it can not be inferred that he consented that he should engage in the hazardous enterprise of swimming a horse—and the employment of a slave in such an undertaking was a wrongful act, rendering the person so employing him liable for any loss which might be regarded as the natural & proximate consequence thereof.

Under these views, we are of opinion that the hiring of the slave Berry to ride and swim his horse in the pond, in the absence and without the permission of his master, was an illegal and wrongful interference with and control of the slave, which, being itself an injury, rendered the wrong doer liable for any loss which may be properly regarded as the natural and proximate consequence of the illegal act. The answer of the defendant admits, in effect, the offer of a reward to Berry if he would swim the horse, or the acceptance of Berry's offer to do it for twenty-five cents. We deem it immaterial therefore to detail the evidence on this point, further than to say, that it shows that the defendant took his horse (then about two years old) to the pond for the purpose of being swum, that he mounted him himself for the purpose, but the horse proving restive, he dismounted—that he requested another person a witness on the trial, to ride him in, but after at first assenting he declined—and that the defendant afterwards offered twelve and a half cents, to a negro, to swim the horse, when Berry coming up about this time offered to do it for 25 cents, to which the defendant agreed. This was hiring and inducing the slave to perform or attempt to perform the service.

The defendant relies upon a subsequent countermand, upon its being said by some one, that Berry could not swim. The testimony on this subject is, that upon this remark being made, the defendant who was then in the pond swimming himself said, as one witness who was on the shore states it; "Berry you had better not come in," and as the other witness who was in the pond with him states, he said once or twice, "Berry if you can't swim don't come in." On which Berry said "you only want to save the quarter, I intend to take that quarter," and rode in, Shanks making no reply. The first witness states that Berry said before he rode in, that he was in the habit of swimming. And there is no proof that he could not swim. Unless as it may be inferred from the fact and manner of his

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being drowned, which cannot outweigh his own declaration and his alacrity in riding the horse into deep water. We are of opinion that this conversation between the defendant and Berry, cannot be regarded as a rescission of the previous hiring, or as a countermand or withdrawal of the desire and implied direction that Berry should swim the horse. It was either mere advice or at most a countermand upon a condition the existence of which is not proved, which referring itself, as it did, to the judgment or will or knowledge of Berry himself, who had already shown himself willing to incur the risk of the desired service, left it, as it was at first, at his option whether or not he would risk the horse in for the promised reward. The defendant did not, by this advice or suggestion, relieve himself from any responsibility that might arise from his previous act. If he had any reason to suppose that Berry could not swim, it was his duty not only to have revoked his offer of a reward, but as far as he could, to have prevented the hazardous attempt which his offer had induced.

The second witness, above referred to, who was in the pond with or near the defendant, and was a witness for the defence, states that, as Berry started in, (after the conversation just stated,) he said twice, "I will duck your horse for you." The witness, who was on the shore and was examined by the plaintiff, states that he did not hear anything said about ducking the horse. There is also some apparent discrepancy between the statements of these witnesses with regard to the immediate circumstances of the catastrophe. The plaintiff's witness stated, that after Berry had swum the horse about thirty yards, he pulled him round by one rein of the bridle. The horse sank his head down, Berry fell over the horse's head, rose once, struggled awhile, and was drowned. The other witness stated, that after Berry had swum the horse a few steps, he saw him jump up far on the neck of the horse, almost to his head, and as he believed, was trying to duck the

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horse; that both sank together—the horse came up at one place, and the boy at another; that Shanks took off his life-preserver and threw it to the boy, and it fell near him, (as to which, both witnesses concur,) but about the time it fell the boy sank, and rose no more; that he and Shanks were both afraid to go to him, and it was all over in a few moments. This witness further said, he thought at first the slave Berry was trying to duck the horse, but afterwards he was led to doubt, and said the boy might have been trying to save himself.

If Shanks heard Berry say that he would duck his horse for him, and understood it as anything but a mere joke, or idle bravado, his failure to interpose peremptorily and actively to put a stop to the adventure, and especially if he supposed Berry could not swim, would seem to implicate him absolutely in the consequences of the attempt, if actually made, even if he were not otherwise involved, in whatever consequences might ensue while the boy was engaged in performing his undertaking of swimming the horse. * But it is improbable, and especially if the boy could not swim, that he should have actually undertaken the perilous feat of ducking the horse. And comparing the statements of the two witnesses, we are inclined to the opinion that that the casualty occurred not from an attempt to duck the horse, but from imprudently or unskillfully pulling him round, as described by the first witness, in consequence of which the horse's head went down and Berry fell off. And even if he could swim, he may have been disabled by a stroke of the horse's feet while under the water. It is not proved that he was in the habit of swimming horses, or that he had ever swum one before. On the other hand, it is proved that the defendant's horse, though young, was gentle, and that he had been swum several times the day before.

If this case depended upon the question of fact, whether Berry attempted to duck the horse or not, we might feel some difficulty in reversing the judgment, on the ground that the Circuit Judge had come to an im-

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proper conclusion from the evidence. But as the second witness doubted the correctness of his own first impressions, which may have been produced by hearing Berry say he would duck the horse, we should be inclined to the opinion, as already stated, that the impressions of the first witness, who stood upon the shore, were probably most correct. We are of opinion, however, that the case does not depend upon this fact, unless upon the ground, which we reject, that the defendant, having heard and believed the threat of ducking the horse, had reason to apprehend such an attempt, and should have prevented it. We put the case upon the broader ground, that the defendant having, without the consent or authority of the plaintiff, and for his own amusement or benefit, employed the slave of the plaintiff in an undertaking obviously hazardous, thereby took upon himself the risk incident to the service, and made himself responsible for any injury which the slave might sustain while engaged in the undertaking and rationally attributable to it, though the injury might proceed immediately from his own willfulness or want of skill, and thus be attributable to more than one cause.

The case, stripped of the immaterial circumstances relied on, is simply this—that the defendant wrongfully, but without intention or expectation of evil consequences, employed the plaintiff's slave in the hazardous undertaking of swimming the defendant's horse in a deep pond, and that while engaged in this undertaking the slave, either in a rash attempt to duck the horse, of which it is uncertain whether the defendant had or had not notice, or from other imprudence, or from carelessness or want of skill, was drowned. It is not necessary that the death of the slave, which was the damage to the plaintiff, should have proceeded immediately or necessarily from the inducement held out by the defendant for the undertaking of the slave, or that it should have been produced immediately by the first act to be done in the course of the undertaking, which was the mounting of the horse. The inducement offered, and

One who employs the slave of another in a hazardous business, without the consent of the owner is liable for any loss that may arise, though it might be the lack of skill in the slave that produced the injury.

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the injurious act of the defendant, extended to the whole undertaking of swimming the horse, as long as it was permitted to be continued under the employment of the slave by the defendant; and the drowning, though not the necessary or expected consequence of the employment and undertaking, was directly attributable to them, though another cause, immediately connected with them, may also have co-operated in producing it. And the consequence thus connected with the wrongful act of the defendant having in fact occurred during the countenance of that act, it was sufficiently proximate to render him liable.

In the case of *Strawbridge vs Turner, &c.*, (9 *Louisiana Reports*, 213,) where the owners of a steamboat suffered the captain to employ a slave as a hand on board, without the authority or consent of his master, and the master hearing that his slave was on the boat, went there to arrest him, and the slave, in endeavoring to escape, jumped, or fell overboard, and was drowned, it was held that the owner was entitled to recover the value of the slave on the ground of the illegal employment by the captain.

(One who employs a slave without the consent of the owner, is liable for the loss of the slave, even without willful misconduct or culpable negligence (2 *Richardson's S. Carolina Reports*, 455; *Wright vs Gray*, 2 *Bay*. 464)—where the slave was induced to ride a race in which he was killed. Cases to the same purport cited, 2 *Richardson's S. Carolina Reps.* 613; *Han-son vs Berkly*, *Shobart's Law Reps.* S. C. 525.

In the case of *McDaniel vs Emanuel*, (2 *Richardson's So. Car. Reports*, 455,) the plaintiff's slave having been received and used as a hand on board of a steamboat, against the consent of his master, and having been knocked overboard and drowned, while the boat was being turned under the direction of the captain, the owners of the boat were held liable for the loss. In the opinion of the Court, it is said that if the slave was retained and used, without the consent of his master, the defendant was liable for the loss, even without willful misconduct or culpable negligence on the part of the captain; that such unqualified liability for the consequences of interfering with and using the property of another, was decided in the case of *Wright vs Gray*, (2 *Bay*. 464,) where Gray was held liable for having induced the plaintiff's slave to ride a race, in doing

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which he was killed, and that this rule of strict accountability applies emphatically to slaves.

- In *Duncan vs Railroad Company* (2d *Richardson's Reports*, 613) the Railroad Company had hired the plaintiff's slave under the agreement that he should not be employed on the cars or locomotives, but that he might be carried on the cars or locomotives from one place to another, on the railroad where his services might be required. The slave with the knowledge of the conductor, went on the cars, and was carried beyond the place at which his services were that day required, and being on the tender, jumped off while the locomotive was moving on with its usual speed, and having jumped into soft sand fell back and was crushed to death by the cars running over him, before they could be stopped. The company was held liable on the ground that they were by their agent conveying the slave in their locomotive against and contrary to their contract with his master. "In such a case (says the Court,) it is in vain to say that the slave was a moral agent capable of wrong as well as of right action, and that he killed himself by jumping off when he ought not."

In the case of *Harrison vs (Beckley, Strobhart's Law Reports, of South Carolina, page 525,)* the defendant had sold a gallon and a quart of whisky to the plaintiff's slave who left the shop without drinking any, and started to go to his masters. He became intoxicated on the way, and the next morning, the night having been misty and cold, he was found dead. The evidence conducted to prove that he died from drunkenness and exposure. The act of selling the liquor to the slave having been wrongful and illegal, the judge left it to the jury to decide whether the drinking, intoxication, exposure and death, were the natural and probable consequences of that wrongful act, holding that if they were the defendant was answerable for the value of the slave. The jury found for plaintiff \$650, and the Court of error was of opinion that the damages were not too remote. In the argument of the case just cited,

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the counsel stated a great number of adjudged cases in illustration of the connection which must subsist between the wrongful act and the damage which ensued, in order to render the wrong-doer responsible. And the Court, in deciding the case, laid down the distinction "between cases where the damage ensues whilst the injurious act is continued in operation and force, and those where the damage follows after the act has ceased. In the former class (say the Court) were the cases of *Wright vs Gray*, (2 Bay, 464,) and all the cases which have been cited or supposed, of slaves put, without the permission of the owners, on race horses, in steamboats, and on railroads—those of property injured during a deviation from the course which was prescribed concerning it, (6 Bingh. 716,) and in general all cases where unexpected damage was done, whilst an unauthorized interference with another's rights lasted. Hence it is usually of small moment to inquire whether the damage was the natural consequence of the injury, because the immediate connexion between the wrongful act and the damage sustained, shows that the damage, however extraordinary, has actually resulted directly from the injury."

In the case of the *Railroad Company vs Kidd*, decided by this Court, (7 Dana, 245,) Kidd brought an action of trover against the Company to recover the value of his slave, who, on Sunday had, without the knowledge of the agent or conductor, (as seems to have been assumed,) got on the cars, which were going out a few miles from Lexington, to return on the same day. On the trip out, the conductor discovered that he was on the car, but did not order him off. Afterwards, under circumstances not necessary to be here stated, upon the conductor's exclaiming, "Boy's, let us get down and stop the cars," this slave, with the others, jumped off, and being inexperienced, fell, and was crushed so that he died. In animadverting upon the instructions given and refused to by the Circuit Court, this Court said, "We cannot admit that, if neither the Company nor its agent th-

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couraged or permitted Philip (the slave) to get on the car, nor knew that he was on it until the train had gone some miles from Lexington, the simple omission to force him off, *the instant he was discovered by the agent*, was, *per se*, a conversion of him, in judgment of law, to the use of the Company." And again the Court say, "According to the facts hypothetically assumed in each of the instructions, (which had been asked by the defendants and refused) the railroad agent exercised no dominion over Philip—claimed no interest in him or his services—nor either did anything, or failed to do anything, whereby he negatived the right of the owner; or which was inconsistent with any such right." It was decided that the Circuit Court had erred in giving and refusing instructions, and on that ground the judgment which Kidd had recovered was reversed and the cause remanded for a new trial.

But as the whole reasoning and conclusions of this Court, were based upon the assumption that no dominion or control had been assumed over the slave, and nothing done negatively or inconsistent with, the rights of the owner, the evident implication is, that if there had been a wrongful assumption of dominion or control, or any violation of the rights of the owner, the Company would have been held liable for the consequences which ensued during the continuance of such wrongful act. So in the case of *Bosworth vs Brand*, (1 Dana, 377,) where Bosworth had permitted his slaves to give an entertainment on his premises, where other slaves of the neighborhood assembled and were permitted to remain in violation of law, and upon the slaves attempting to escape, when a patrolling party surrounded the house, one of the patrol wantonly fired among them and killed the slave of Brand, the judgment which Brand had obtained was reversed. But it was on the ground, that although there was no alleged act on the part of the defendant, there was no illegal assumption of control over the slave, and that the damage which had ensued was too remote, and was not,

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properly speaking, caused by the illegal act. In the opinion in that case, the following language is used: "And here, in the not attending to the important distinction between the assumption and non-assumption of legal control, lies the fallacy of the argument of the learned counsel in favor of the verdict, and exists the want of analogy between this case and all or most of those to which he attempted to liken it."

The case of *Swigert vs Graham*, (7 B. Monroe, 661,) went upon the ground that the plaintiff's slave being hired by his owner as a hand on a steamboat, was subject to the risks ordinary and extraordinary of that service, and that he being drowned in that service, the owners of the boat were responsible only for misconduct or culpable negligence. The case of *Hawkins vs Phythian*, (8 B. Monroe, 515,) was also a case of bailment, but it seems to be asserted that Bacon, who was not a bailee, was liable for the loss of the slave, consequent upon his putting the slave upon his horse, knowing at the time that he was vicious and unmanageable.

It may be impossible to express in general terms the precise relation which should exist between an illegal act and the ensuing damage, in order to throw the responsibility on the wrong-doer. But upon the authority of the cases which have been referred to, and in view of all the principles which occur to us as applicable to the subject, we conclude that the defendant having illegally and in violation of the rights of the plaintiff employed Berry in the dangerous service of swimming his horse, though he might not have been liable if some one on shore had shot Berry while in this service, he is liable for a casualty incident to the nature of the service; and that so far as its happening or not happening may have depended upon the skill or care or prudence of Berry, or his want of these qualities, the risk was taken by the defendant, who employed him. These circumstances could only determine the degree of hazard incurred by the service, to which the peril of being drowned, however skillful a person may be in swim-

ming, is an incident. That the defendant did not ascertain the facts with regard to Berry's skill, while it may show that he considered that there was no danger, shows also that he deemed the particular facts immaterial. And we think he stood in effect as an insurer against the loss of Berry by drowning while engaged in the service in which he had employed.

Wherefore, the judgment is reversed, and the cause remanded for a new trial, in conformity with the principles of this opinion.

Bell, Balkingier and Varnon for plaintiff; *Harlan* for defendant.

MILLER
vs
YOCUM.

Miller vs Yocum.

ERROR TO THE WASHINGTON CIRCUIT.

Appeals. Jurisdiction.

Judge Hiss delivered the opinion of the Court.

THE plaintiff in error sued the defendant before a justice of the peace, for sixteen dollars due by account, and recovered a judgment for one dollar and ten cents, with interest. Not being satisfied with this judgment, he appealed to the County Court, where his appeal was ordered to be dismissed, and he has appealed to this Court.

Although appeals or writs of error cannot be prosecuted to this Court, from *judgments* of the County Courts *affirming* or *reversing* the judgments rendered by justices of the peace, (1 Stat. Law, 133,) yet, from an order or judgment of such Court, not *affirming* or *reversing* the magistrate's judgment, but dismissing an

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Case stated.

Appeals or writs of error cannot be prosecuted to the Court of Appeals, from judgments of the County Court affirming or reversing judgments rendered by jus-

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times of the
peace, (1 Stat
Law, 133.) yet
appeals or writs
of error will be
from judgments
dismissing an ap-
peal therefrom—
(10 B. Monroe,
292; ib. 196.)

appeal therefrom, an appeal will lie to this Court. An order to dismiss an appeal, neither *reverses* or *affirms* the judgment of the justice, but refuses to do either, and is therefore not embraced by the terms of the statute above referred to. The law has been so ruled by this Court, in the cases of *Evans vs Sanders*, (10 B. Monroe, 292,) and *Waggoner vs Highbaugh*, (ib. 196;) therefore the appeal to this Court, in this and like cases, will be entertained. Then did the County Court err in dismissing the plaintiff's appeal, and in refusing to take jurisdiction of his case? The ground taken by defendant in error is, that inasmuch as the judgment of the justice was in favor of the plaintiff, although for a much smaller amount than demanded by the warrant; or in other words, as the judgment was not *against* the plaintiff, and not in favor of the defendant, the plaintiff has no right to appeal to the County Court, or to any other Court, by virtue of any statute in force in the State. So that in this view, if there be a judgment rendered by a justice, in favor of the plaintiff, for any sum however inconsiderable, and though he may be thereby unjustly refused nearly the whole amount of his demands against the defendant, yet he could not appeal to the County Court, though the sum demanded be under five pounds.

A plaintiff on a warrant before a justice, demanding more than 25 shillings and less than five pounds, & obtaining judgment for less than that sum claimed, may appeal to the County Court; (2 Stat. Law, 889.) *Miller vs Couchman*, (4 J. J. Mar 242;) *Vance vs Cox*, (3 Dana, 162.)

Such consequence, however, cannot result from the acts of 1796 and of 1800, (2 Stat. Law, 887-889,) when taken in connexion, and reasonably and properly construed, so as to give effect to the intention of the Legislature. The act of 1796 deprives the *defendant* only of the right to appeal to the County Court, where the sum recovered does not exceed twenty-five shillings; if it exceeded that sum, the defendant could appeal. The act of 1800 provides, that if the judgment of a justice is given against the *plaintiff*, he shall have a right to an appeal also, provided the sum demanded by him is of the value of twenty-five shillings, (2 Stat. Law, 889.) The obvious meaning of which is, that if his demand is disallowed by the sum of twenty-five shillings or more,

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he may appeal to the County Court, (if the whole sum demanded by him does not exceed five pounds,) although he may have a judgment for a small fraction of his demand, such judgment is in substance and virtually *against* the plaintiff for the amount demanded by him over and above the sum adjudged to him, and to that extent is within the meaning of the statute a judgment *against* the plaintiff; and if the sum thus disallowed the plaintiff in the judgment of the magistrate, exceeds the sum of twenty-five shillings, and the whole sum demanded does not exceed five pounds, he has a right to appeal to the County Court, and that Court is bound to hear and determine the same upon the merits of the case.

This construction of the acts referred to is sustained substantially by the former opinions of this Court, pronounced in the cases of *Mills vs Couchman*, (4 J. J. Marshall, 242,) and of *Vance vs Cor*, (2 Dana, 152.) The principle decided in these cases is, that where appeals and writs of error are allowed as dependent upon the amount in contest, that then the *sum demanded*, and not the *amount* for which judgment has been rendered, determines the question as to whether an appeal or writ of error may be prosecuted, and in what Court it may be done. In this case, then, if by the judgment of the justice the plaintiff has lost twenty-five shillings or more of his demand, though that judgment gave him a *small fraction* thereof, yet, as the *amount demanded*, and not the *sum recovered*, determines the right of appeal; and as appeals lie to the County Court, where the *amount* in contest does not exceed five pounds and does exceed twenty-five shillings, therefore the appeal in the case in question was well taken to the County Court.

Wherefore, the judgment of the County Court, dismissing the appeal, is reversed, and the cause remanded, with direction to that Court to hear the appeal, give the parties a trial of the case upon its merits, and for further proceedings.

Harlan for plaintiff; *W. E. Riley* for defendant.

CHANCERY.

December 20.

Case 83.

Case stated.

Wickliffe vs Buckman.

ERROR TO THE WASHINGTON CIRCUIT.

Appeals and writs of error. Injunction. Damages.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

BUCKMAN exhibited his bill in chancery against Wickliffe, and obtained an injunction to prevent the latter from collecting some judgments at law he had recovered against him.

The cause was tried, and by a decree of the Circuit Court, the complainant's bill was dismissed and his injunction dissolved, but without damages. Buckman appealed to this Court, and the decree was affirmed.

This writ of error is now prosecuted by Wickliffe, to reverse the decree of the Circuit Court, because it did not require the complainant to pay to him ten per centum damages on the amount of the judgments at law, which had been enjoined.

The statute of 1838, (3 *Statute Law*, 35,) giving the right to assign cross errors without prosecuting a cross appeal or suing out a writ of error, does not deprive the party who may fail to assign cross errors or prosecute a cross appeal, from prosecuting a writ of error after an affirmation upon the appeal or writ of error of the other party

The first question to be determined by the Court is, whether, since the passage of the act of 1838, (3 *Stat. Law*, 35,) allowing the appellee, or defendant in error, to assign cross errors, without prosecuting a cross appeal or suing out a writ of error, he may, although he fails to avail himself of the right which that statute gives to him, still prosecute a writ of error to reverse the decree after it has been affirmed.

Previous to the passage of the statute, the appellee, or defendant in error, had no right to object to the decree; but if the errors complained of were not injurious to the appellant, or the plaintiff in error, the decree was affirmed, and the defendant in error was then allowed to prosecute his writ for the correction of any errors in the decree that were to his prejudice.

The statute gives him the right to assign cross errors, but does not deprive him of the right that belonged to

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him at the time of its passage, to prosecute a writ of error, after an affirmance, for the correction of the decree, so far as it may be injurious to him. The right given by the statute is merely cumulative, and a failure to exercise it, does not take away the previously existing right. The defendant in error has the option to proceed in either way, and unless he makes his objections to the decree, by the assignment of cross errors, he can, if the decree be affirmed, subsequently prosecute his writ of error. It might have been good policy for the Legislature, when the assignment of cross errors was allowed, to have taken away the right of the defendant to prosecute a writ of error, if he failed to assign cross errors, but not having done so, either expressly or by necessary implication, the right must be deemed still to exist. Wickliffe, therefore, has a right to prosecute this writ of error, although he failed to assign cross error when the case was before the Court upon the appeal taken by Buckman.

The next question to be considered is, whether ten per centum damages on the amount enjoined should have been decreed against Buckman upon the dissolution of his injunction. The equity relied upon to sustain the injunction, was the alleged inability of Wickliffe to make a title to the land according to the agreement of the parties upon which the notes were executed, for the non-payment of which the suit at law had been brought and the judgments recovered which had been enjoined. By affirming the decree of the Court below, this Court decided that Wickliffe was able to comply, and had complied with the contract upon his part. If such were the state of case when Buckman obtained his injunction, he had no equity, and ten per centum damages should have been decreed against him, when the injunction was dissolved. We are of opinion that the deed executed in the joint names of Wickliffe and Short, conveyed the title to Buckman, and as that deed was executed before Buckman instituted his suit in chancery, and contained a warranty of title upon

Where there exists no ground for an injunction enjoining a judgment, at the filing of a bill ten per cent. damages should be given upon its dissolution.

Hahn vs Hart. upon the part of Wickliffe, that no cause existed that authorized the injunction at the time it was obtained, and consequently ten per centum damages should have been decreed against the complainant. Wickliffe, it is true, procured, during the pendency of the suit, another deed from Short, but that was unnecessary, as he had previously complied with his contract, and conveyed Short's title to Buckman.

Wherefore, the decree of the Court below is reversed, and cause remanded, with directions to dismiss the complainant's bill, and to dissolve his injunction, with ten per centum damages on the amount enjoined at the time the injunction was obtained.

Wickliffe for plaintiff; *Kelley* for defendant.

CHANCERY.

Hahn vs Hart.

December 20.

ERROR TO THE NELSON COUNTY COURT.

Case 84.

Militia fines. Chancery jurisdiction.

JUDGE MARSHALL delivered the opinion of the Court.

THE credits claimed by Hahn in his bill may be divided into three classes, of which two may be distinguished from the third by the fact that the grounds of the former existed before the judgment sought to be enjoined; and the latter have occurred since.

Of the first class, are the credits for claims which Hahn, the collector of the 2d regiment Kentucky Militia, exhibits against the regiment, and which exceed the amount of the judgment. Of the second class, are credits claimed for two fines with which he was probably charged in making up the judgment, but which

12bm426
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are alleged to have been previously remitted by the Governor, and to have been therefore uncollectable and improperly charged against him. HARRIS vs HART.

The third class consists of credits claimed for fines charged in the judgment, but since remitted, and therefore uncollectable.

It appears, that after a serious contest in the trial of the motion of the paymaster against the collector, they agreed that judgment should be rendered for a sum smaller than that for which the County Court was about to render it, and it seems to have been understood that the judgment so rendered should be a final close of the contest. These facts, though not appearing in the judgment, are alleged in the answer, and proved by witnesses; and the relief sought by the bill is resisted, not only on the merits of the several claims, but also on the ground that the judgment was the result of compromise; and further, that on account of the peculiar nature and subject of the proceeding, the Court of Equity has no jurisdiction.

But although the subject and the proceeding are peculiar, they are not exempt from the influence of fraud, accident and mistake, and the Court of Equity may relieve against there, if they have effected a judgment even in this proceeding, and although that judgment be the result of a compromise entered into under the same influence. We are of opinion, however, that the County Court had plenary jurisdiction over all claims and counter-claims which might affect the liability of the collector and its extent; that the mode of assessing and collecting fines and of auditing and paying claims, and of settling with and proceeding against the collector, being all prescribed by statute, the County Court being authorized to give judgment upon the whole case, the Court of Equity cannot, except upon the ground of fraud, accident or mistake, give relief against a judgment of the County Court in such case, and especially a compromise judgment, either by allowing any credit or deduction which the County Court could not have

A judgment, though entered upon a compromise, may be enjoined or reduced if there be fraud, accident or mistake in obtaining it.

HARRIS HART.

allowed if brought before it, or by allowing any which, though it might have been allowed by that Court, was not there claimed. The Court of Equity cannot interfere with or disturb and has no right to overrule an adjustment of these accounts fairly made by the authorized tribunal in the prescribed mode, with full opportunity to both parties to present and support their claims and counter-claims.

If there be error in the proceedings of the Court, either in the improper rejection of evidence or in the improper allowance of any claim proved before the Court, the remedy is by bill of exceptions and appeal or writ of error, and not by resort to the chancellor; and if without fraud, accident or mistake, a party has failed to present or prove a claim which he might have established, there is no ground for relief in equity.

The Co'ty Courts have full power to adjust and settle, and allow or reject, any credits claimed by collectors of militia fines, and render judgment for the true balance; and the chancellor cannot overhaul and re-adjust settlements, when there has been no fraud, accident or mistake. The remedy is by an exception to the opinion of the Court in rejecting credits claimed, &c.

This conclusion disposes of the two first classes of credits or deductions claimed by the bill. We will add that, as to the first class, not only is no reason shown for not presenting them in the County Court, unless it be inferred from the fact that if presented they could not have been allowed, but as we understand the facts now presented, the allowance of them to any extent would violate the order of payment according to seniority presented by the statute, (3 *Stat. Law*, 434,) which the Court of Equity has no more right to do than the County Court had. And as to the second class, which might have been allowed in the County Court, it was probably presented and probably disallowed, but neither is absolutely certain. And if both be assumed, it does not appear that the remission was proved in the County Court, nor is there any allegation of fraud, accident or mistake, by which its establishment by proof was presented; nor, indeed, is it established by proper evidence in this record. There is, therefore, no ground for relief as to any of these claims. And in fact, the complainant's own declaration at the time, and shortly after the rendition of the judgment, tend to show that its amount accorded very nearly with his own views of

his liability, and no subsequent discovery of facts which should have diminished it, is shown. HARRIS vs HART.

The claims for credits of the third class stand on different grounds. They could not have been presented to the County Court, but arise from the remission of fines since the rendition of the judgment. And although it be true that the collector was in default for not having collected these fines before the judgment, and although it may be that he might have collected them afterwards, before they were remitted, yet, as they were finally remitted, the probability is, that a remission would have been granted whenever applied for, and that it would have been obtained whenever the collection was pressed. And not only has the remission put it out of the power of the collector to collect these fines, on which the judgment was in part founded, and thus to remunerate himself *pro tanto* for the sum to be paid under the judgment, but as it must be presumed that there was just ground for the remission, the inference is that the fines were never in fact justly due. And as it now appears that they ought not to have been coerced, and perhaps could not at any time have been actually coerced, the regiment cannot equitably claim that the collector should be held bound for his failure to collect them. To the extent of these subsequent remissions, therefore, and no further, the complainant was entitled to relief upon his bill and amended bills.

Wherefore, the decree dismissing the bill is reversed, and the cause remanded, with directions to perpetuate the injunction for the amount of the remissions subsequent to the judgment, and to dissolve it with the damages as to the residue of the judgment enjoined.

Wickliffe for plaintiff; *Hite and Muir* for defendant.

A collector of militia fines, against whom judgment has been rendered for failing to collect and pay over according to law, may in chancery obtain a credit for fines rendered and collected by him in consequence of remissions by the Governor subsequent to the judgment.

FOR. EN. &c.

Goodlet vs Cleaveland.

December 20.

ERROR TO THE WASHINGTON CIRCUIT.

Case 85.

Forcible entry, &c. Tenants, notice to quit.

JUDGE CRENSHAW delivered the opinion of the Court.

Case stated.

THE evidence satisfactorily shows that C. Barnet entered upon the premises in controversy under, and as tenant to Rutherford; that Rutherford sold and assigned the title bond, held by himself and Cornish upon Hudgins, to Cornish, who sold and assigned the bond to Cleaveland, the plaintiff; that Rutherford, after his assignment to Cornish, ceased to have anything more to do with the land; that Barnet rented from Cleaveland the second year after his entry under Rutherford; that Barnet, having determined to leave, made an agreement with E. Goodlet whereby Goodlet entered upon the premises and undertook to pay Cleaveland the rent, which Barnet had agreed to pay him. E. Goodlet then rented the premises from Cleaveland for the year 1845.

E. Goodlet remained upon the premises till about April, 1845, when he died, leaving his son, David Goodlet, the defendant, on the land, with the balance of his family.

It is evident that, although E. Goodlet did not *enter* upon the premises under the plaintiff, Cleaveland, he entered under Barnet, who entered under Rutherford, under whom Cleaveland claims, and whose title Cleaveland held. And, when the defendant disclaimed Cleaveland as his landlord, Cleaveland had a right, without any notice to quit, to maintain his warrant of forcible entry and detainer, as soon as his own lease to E. Goodlet expired.

Case distinguished from that of *Helm vs Slader*, (1 A. K. Marsh. 320.)

In the case of *Helm vs Slader*, (1 A. K. Marsh. 320,) it is decided that where a tenant obtains possession under one man, and then takes a lease from another, and

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holds over, he is not liable to a warrant of forcible detainer by such lessor. But, in that case, Helm did not show that he was the holder of the title under which the tenant entered, or that he was connected with it in any way—he appears to have been a mere stranger; and, upon this fact that decision is predicated. In the case under consideration, the defendant is shown to have entered under Barnet, who entered under Rutherford, under whom the plaintiff claims, and whose title the plaintiff holds. In *Haynes vs Adams*, (3 *Marshall*, 156,) it is decided that wherever the person in possession entered as tenant to the plaintiff, or those under whom the plaintiff claims, a writ of forcible detainer may be sustained for holding over.

In the case of *Sullivan vs Enders*, (3 *Dana*, 66,) a purchaser under an executory contract from the lessor who appears to have the legal title to the land, was derived the right to maintain a warrant for forcible detainer against the tenant of his vendor, because, as we understand the opinion, it did not appear that the purchaser was entitled to the possession. The Court in that case say, “that the bond for a conveyance did not vest in the purchaser the legal right to the possession, or substitute him as landlord.” Here, the plaintiff in the warrant is the holder of all the right and title of the original lessor, and has as much right to maintain his warrant for a forcible detainer as the original lessor would have, had he never parted with his right. By the assignment of the title bond, Rutherford, the original lessor, parted with his *entire* interest. So much of what is said in 3 *Dana*, *supra*, as might seem to authorize the inference that the plaintiff in the warrant must have the *legal title* in order to succeed, we esteem as extrajudicial, and not at all necessary to be decided in that case. The plaintiff in the warrant in that case did not show himself entitled to the possession, and, of course, could not sustain his warrant. There is no doubt that Rutherford, who held only an *equitable title*, had he not parted with it, could have maintained his

A purchaser of the equitable title of a lessor can maintain forcible detainer against a tenant who holds over.

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warrant, and the vendee of his *whole* interest, has, in our opinion, an equal right to maintain his suit.

After the agreement of E. Goodlet with Barnet to "take Barnet's contract with Cleaveland off his hands," E. Goodlet rented the premises from Cleaveland for the year, 1845. Cleaveland, therefore, although he could not maintain his warrant for a forcible detainer, based upon his own lease to E. Goodlet, had no right to institute a warrant for forcible detainer, until his lease to E. Goodlet had expired. And the warrant in this case was brought within two years from that time; so that he was not barred by the statute of limitations.

A tenant who denies the title of his landlord is not entitled to notice to quit before suit for the possession is brought.

The possession of the defendant was of a distinct and separate part of the premises from that occupied by Mrs. Goodlet, and he, having disclaimed Cleaveland as his landlord, was subject to be turned out, notwithstanding his occupancy may have been under an agreement with his mother, that he should occupy the house in which he lived—she, herself, had no right, and could confer none upon her son.

The guardian *ad litem*, appointed by the Court, was no doubt appointed for David Goodlet, the defendant, although the record states that he was appointed for *David Cleaveland*. The guardian was appointed, as the record shows, to *defend*; and there are only two parties—*John Cleaveland*, plaintiff, and *David Goodlet*, defendant. It is clear, therefore, that the appointment was understood in the Court below to be for David Goodlet, the defendant, and, the fact that the appointment was not made until the trial had made some progress, should not, in our opinion, be regarded as erroneous. The guardian made no objection to the Court's progressing with the trial, nor suggested any injury to the the defendant from anything that had transpired before his appointment; and we are satisfied that, as full justice was done to the defence, as if the appointment of the guardian had been made before the trial commenced.

The instruction of the Court to the jury is consistent with this opinion, and those asked by the defendant and refused, are inconsistent therewith.

Wherefore, the judgment is affirmed.

Thurman and Alfred for plaintiff; *Harlan* for defendant.

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vs
PROCTOR, &c.

Mackey vs Proctor, &c.

APPEAL FROM THE MASON CIRCUIT.

Curtesy. Femmes covert.

CHANCERY.

December 20.

Case 86.

JUDGE HISE delivered the opinion of the Court.

Case stated.

JUDITH H. YOUNG, on the 13th of September, 1815, conveyed to her son, Willoughby Young, a tract of land in Mason county, by a deed of gift, setting out a merely nominal consideration, which contains a reservation expressed in the following terms:

"And it is further understood and agreed between the parties, that the said Judith H. Young is to reside on the land during her life, or so long as she may think proper."

Willoughby Young, the conveyancee, died, (his mother surviving,) and left one child only, (a daughter,) Ann Maria Young, who intermarried with George M. Proctor. George M. Proctor and his wife, after the death of Willoughby Young, conveyed the same land to W. H. Power by deed, dated October 2, 1840. Power and wife then re-conveyed the land to G. M. Proctor, by deed dated the 25th of March, 1841.

Proctor, by this device of the conveyance to Power, and of Power's re-conveyance to him, supposing that

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he had invested himself with his wife's title to this land, conveys the same land to the complainant, Wm. Mackey, by a deed of mortgage dated 28th July, 1841, to secure him against liabilities incurred and that should be incurred by Mackey for Proctor.

And again Proctor and wife conveyed the land to William Mackey and John M. Duke, jointly, by a deed of mortgage dated 15th of February, 1842, to secure them in their liabilities as sureties for Proctor.

At the date of these conveyances to and from G. M. Proctor, Ann Maria, his wife, who was daughter of Willoughby Young, deceased, was an infant and under twenty-one years of age; and Judith H. Young, from whom the title can only be derived, was living.

A conveyance
 by an infant *feme*
covert is void.

Mackey institutes this suit in chancery to enforce his lien upon the land, alleging that he had paid a large amount of money as surety for Proctor, and demanding a foreclosure of his mortgage. John M. Duke becomes a party to the suit, and concurs with Mackey in prosecuting the same against Proctor and his wife and Judith Young and others, demanding that the land be sold, and claiming rents and profits. Before the suit is finally terminated, Ann Maria dies, and the suit is then by bill of revivor prosecuted against her two infant children. In the further progress of the suit Judith H. Young, who had thus survived both her son Willoughby Young, and her grand-daughter Ann Maria Proctor, also dies, her administrator is by amended bill made a party.

Ann Maria Proctor, previous to her death, filed her separate answer, and relied upon her infancy to avoid the deed to Power and the mortgage to Mackey and Duke, and after her death her children, by their *guardian ad litem*, answer and insist upon their title to the land and the invalidity of the deeds which their mother had been induced to execute whilst she was an infant.

A mother conveyed to her son a tract of land, reserving to herself "the right to reside on the land during her

Upon the state of case as presented, Proctor never had any right or title to the land in contest to convey to Power, Mackey, or Duke. It is clear that, as Mrs. Proctor was an infant at the date of the deeds, which

she concurred with her husband in executing. And as she repudiated those deeds by answer in her lifetime, and her children since her death pleading her infancy, they could not pass to the complainant her right to the land, whether it was an absolute *fee simple* estate, or a remainder in fee, upon the termination of her grandmother's life interest. Her infancy was plead and relied upon by her in due time whilst she lived, and by her infant children after her death. If Proctor's wife had a present absolute estate in fee to the land, as he had issue by her, then, if the wife had been actually seized or possessed of the land during her marriage, Proctor would, in such case, have acquired an estate in the land during his own life as tenant by curtesy. But it is very questionable, from the proof in this cause, whether there had been at any time after the death of Willoughby Young, and before the death of Mrs. Proctor, any such actual seizen during the coverture by Proctor and wife, or either of them, as in legal contemplation is necessary to invest the husband with curtesy in the land. But this very doubtful question of fact need not be determined in this case, the one way or the other, as by the reservation in the deed from Judith Young to her son Willoughby, expressed in the language above quoted, she retained an estate in the land, or a right thereto, for and during her own life. It would be a very narrow and unreasonable construction of the words used, to make them mean that she retained only the right to breathe, live and stay on the land, in a house, her privileges limited to the mere circumference of her dwelling, and that her right even to this limited extent, to be forfeited by failure to continue such actual residence on the land. This land was given by the mother to her son voluntarily; but she reserves the right in the deed to reside on it during her life, or as long as she thought proper. This reasonably imports that she retains the use and occupation—the right to have and enjoy the land—not a small part or fraction thereof, but the land *conveyed*—that is, the whole

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life, or so long as she may think proper; the son died, the mother still living, leaving an infant daughter, his only child, who married, & with her husband, she being still an infant, united in a conveyance of the land; it is re-conveyed to the husband of the daughter, who makes a mortgage of it; and again the husband and wife make a second mortgage, the latter being still an infant, the mother, who first conveyed, being still living. Suit brought to foreclose the mortgages. The infant *feme covert* answers, setting up and relying upon her infancy, and dies; her children, being infants by *guardian ad litem*, rely upon the same ground of defence.—Held, that the life estate of the first grantor still existing, that the husband of the heir of the first grantee, who made the mortgage, never was seized—was not tenant by the curtesy, and that there was no interest upon which the mortgage could operate, and that no title passed by deed or mortgages.

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A husband of tenant in remainder held not to have such seizure during the pendency of the life estate as to make him tenant by the curtesy.

land, during her life. Willoughby Young, by the deed, therefore, did not acquire any right to the actual possession and immediate use and occupation of the land, but an interest in remainder, or an estate in fee, to take effect after his mother's death. At all events, Willoughby Young did not take such a present right and interest by said deed, nor did any such immediate estate or right to the land pass by inheritance to his daughter, Ann Maria Proctor, as that there could be such seizen thereof during the lifetime of Judith H. Young as would invest G. M. Proctor with curtesy in the land; and because the life estate of Judith H. Young in the land continued after the coverture of Proctor and wife had ceased by reason of the death of the wife. Judith H. Young, surviving G. M. Proctor, under whom the complainant holds and claims, never was and never could be entitled to curtesy in the land. (See *Archbold's Blackstone*, 124; 4 *Kent's Commentaries*, 29.)

The decree of the Circuit Court, of May, 1846, and of March, 1851, both being approved by this Court, and consistent with this opinion, it is not necessary to decide the question presented in the pleas filed; and issue made up in this Court, whether it be final or interlocutory, the decree of May, 1846, not being in conflict with the final decree rendered in the cause; and both being rendered in conformity with the views of this Court, the same are affirmed.

Taylor and Waller for appellant; *Hord* for appellee.

ROSS vs ROSS.

CHANCERY.

ERROR TO THE GARRARD CIRCUIT.

December 22.

Wills. Devises.

Case 87.

JUDGE HISE delivered the opinion of the Court.

Case stated.

AMBROSE ROSS, dec'd., made his will, dated December 8th 1810, devising the plantation on which he lived to his wife during her life, and over to his son David Ross in fee simple, after the death of his mother. His land *elsewhere* he gave to his two sons Thomas and Robert Ross, to be equally divided between them upon their arriving at 21 years of age. On the 22d of March, 1811, the testator made a codicil in which he refers to his will and confirms it, and gives a trifling legacy to his daughter, Nancy Ross. After the date of this will and codicil, Ambrose Ross, the testator, acquired the title to a tract of land adjoining the plantation on which he lived containing about 97 acres by a deed of conveyance from James Thompson to him, dated the 16th day of May, 1814. A patent from the Commonwealth dated 25th April, 1822, issued in the name of the testator for about 6½ acres of land, adjoining the 97 acres, this grant issued after the death of the testator, whose will was proved and ordered to be recorded at the January term 1822, of the Garrard county Court. After testator's death in 1822, his wife supposing that these two tracts of land composed a part of the plantation devised to her during her life, with the acquiescence of the heirs of Ambrose Ross, entertaining perhaps the like supposition, took possession thereof, and used and occupied the same until she died in the latter part of the year 1842, or beginning of the year 1843. It was in January, 1843, that her will was proved and recorded. After her death David Ross, to whom as before stated, the testator Ambrose Ross, by

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his will, had given the plantation on which he lived after his wife's death, came into possession of the tracts of land in contest, and claimed them under the will. In February, 1846, Samuel Ross, Thomas Ross, and Robert Carpenter, and Mary his wife, formerly Ross, as heirs at law of Ambrose Ross, dec'd., institute their suit in Chancery in the Garrard Circuit Court against David Ross and the other heirs of the testator, for a partition of the 97 acres and the $6\frac{1}{4}$ acres of land, and insisting that David Ross should account for rents and profit. The Court below refused to decree a partition of these tracts of land, or to require David Ross in his individual character, or as executor of his mother's will, to account for the rents and profits thereof, and dismissed the complainant's suit to that extent; and erroneously.

There is no expression contained in the will of Ambrose Ross which manifests an intention that lands to which he might afterwards acquire the title, should pass under it; he gives his plantation which he *then* at the date of his will lived on, to his wife for life, remainder in fee to his son David, his other lands, (which then belonged to him) he gave to his sons Thomas and Robert Ross.

Lands acquired after the date of a will do not pass by the will, unless there be terms used in the will clearly expressing an intention to pass after acquired lands.

He did not then own the 97 acres of land, or the $6\frac{1}{4}$ acres. The first was conveyed to him in 1814; the grant for the latter, issued after his death. It is well settled, that lands acquired by a testator, after he has published his will, and which are not devised therein, cannot pass by it, unless words are used showing that it was the intention of the testator that such after acquired lands should pass to his devisees named therein, or some of them. No such words, indicating such intention, are contained in the will in question. Hence, as to the lands in contest, Ambrose Ross died intestate, and they descended to his heirs at law.

The defendant, David Ross, relies on lapse of time and the statute of limitations, claiming that his mother, in her lifetime, and he, since her death, have had more

than twenty years adverse possession of the lands in dispute.

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If it be conceded that the possession of the widow of testator was *adverse* to the claim of her husband's heirs, so that she might, if living, have relied on its continuance for 20 years, as conferring upon her an absolute fee simple estate, and as a bar to the claim of her children, (which is not by any means admitted,) yet, upon her death, her rights acquired by such possession would descend and enure to all her heirs, including complainant's, and not exclusively to David Ross.

Can the possession of a widow, to whom a life estate in lands is given by the will of her husband, of lands adjacent, but not embraced in the will, be regarded as *adverse* to that of the heirs of testator?

But can the possession of the widow be regarded as *adverse*? The testator having died intestate as to the lands in contest, they descended to his heirs at law, subject to the life estate of the wife in one-third thereof, as for her dower. She then had a right to the possession and enjoyment of one-third of the land during her life; and having such right, will she be permitted to take possession, and then make that possession *adverse* to the claim of the heirs, and even *adverse* to her own rightful claim to dower in the land, when the claim of the heirs and her own are consistent with each other and derived from the same source? Let this be as it may, after her death, her possession and right growing out of it, ceased, and the lands would descend to complainants and defendants, either as the heirs of Ambrose Ross, deceased, or as hers. The Court below, therefore, should have ordered an equal and just division of these two tracts of land between the heirs of Ambrose Ross, deceased.

The rents due from David Ross should be ascertained and decreed against him, to be divided between the heirs. Rents should not be allowed against the estate of Mrs. Ross, deceased, because she had a right to the enjoyment of a dower estate in the lands, and her use and occupation thereof whilst she lived was voluntarily allowed and permitted by the heirs.

The proceedings had and decree rendered upon the amended bill of complainant, filed the 4th November,

Where the heirs of a widow, to whom a life estate in the plantation of the testator was given, was permitted during her life to enjoy other and after acquired lands—Held, that their consent to such enjoyment should be presumed and no claim for rents to arise.

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1847, are irregular and manifestly erroneous, they seek to have a settlement with David Ross, of his accounts as executor of his mother's will and distribution of her estate, when it appears from the will of testatrix that neither of the complainants have any interest in the general estate under the will, which was all given, with the exception of a few specific devises of slaves and inconsiderable pecuniary legacies to David Ross himself.

Thomas Ross, one of the complainants, has no interest whatever under the will, as it appears that he had received the slave devised to him. Carpenter's wife has no interest under the will, except a slave, named Harvey, was devised to her; and it is not alleged in the amended bill that she has not received him. At all events, the title to the slave passed to her and her husband immediately by the will, without the previous assent of the executor; and if their slave is held adversely, it is not shown that there is any obstruction to their legal remedy to recover that slave.

The other complainant, Samuel Ross, has only a pecuniary legacy of five dollars. He died pending the suit, and his heirs only join in a bill of revivor and concur in the amended bill filed, 4th November, 1847; whereas, his administrator was a necessary party in a suit for the recovery of the small pecuniary legacy left to him.

The other persons who have slaves devised and legacies given to them under the will, do not answer at all, and may be satisfied, for aught that appears. The complainants' amended bill, filed 4th November, 1847, should have been dismissed without prejudice.

Wherefore, the decree of the Circuit Court is reversed, and the cause remanded, with directions to render a decree for an equal and just partition of the tracts of land of 97 acres and $6\frac{1}{4}$ amongst the heirs at law of Ambrose Ross, deceased, to ascertain the rents due from David Ross, and directing their payment and distribution between the heirs, and for further proceedings in

conformity with this opinion. The plaintiff in error is entitled to costs in this Court.

Dunlap for plaintiff; *Turner* for defendant.

SHEAN
vs
WITHERS.

Shean vs Withers, &c.

APPEAL FROM THE HARDIN CIRCUIT.

Trespass. Tenants. Possession.

TRESPASS Q.
C. FREIGHT.

December 22.

Case 88.

JUDGE CRENSHAW delivered the opinion of the Court.

Case stated.

THIS is an action of trespass *quare clausum fregit*, brought by Shean against Gideon and Thomas Withers, and John Hall, for entering the plaintiff's close, throwing down his fences in three places, and turning stock upon his wheat, corn, barley, &c.

The testimony shows, that some six or seven years before the trespass complained of, the plaintiff joined his fences in three places to the division fence between himself and the Withers'; that they had thrown the plaintiff's fence down at the three places where they joined the fence of the defendant, and, at each place, had turned one pannel of the fence around; and that, in consequence thereof, his crop was exposed to stock, which went in upon his barley, &c., and destroyed it.

Whilst the defendants were engaged in pulling down the fences of the plaintiff, and in removing the division fence of the Withers', the plaintiff requested them to allow him again to join his fences with the fence of the Withers' at the place to which their fence was being removed, until he could get rails and build another fence of his own, to run parallel with the fence of the Withers'. This request was refused.

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One may stand upon his own land and be guilty of a trespass upon the land of his neighbor, by throwing stones upon his neighbor's ground, or with a pole or rail reaching over upon another.

There is a slight difficulty in fixing the precise position of the division line between the plaintiff and the Withers', but we think the testimony clearly preponderates in showing that the division fence of the Withers' was, in several places at least, over on the land of the plaintiff. We esteem it immaterial, however, to ascertain the precise position of the division line, as the testimony leaves no room to doubt that the defendants, in turning round the pannels of fence of the plaintiff, entered his close. Even if they stood upon their own land and moved the fences of the plaintiff at points upon his own land, by taking hold of the ends of the rails, it was an entry into his close, in contemplation of law. If a man stand upon his own ground, and throw stones, and break another's house; or, with a pole or rail, reach over upon the land of another to his injury, it is an entry of his close.

But, it may be said that where a man finds the rails of another reaching over upon his own land in part, he ought to have a right to displace them—to remove them out of his way, without incurring responsibility. However this might be, under ordinary circumstances, it is not necessary now to determine; for, we are satisfied that, under the facts in this case, the defendants had no such right.

When one joins his fence to another, and it is acquiesced in for several years, the former will be tenant from year to year, and the latter may not, without notice to remove the fence, discontinue the fences, to the injury of the crop of the former, without being guilty of a trespass.

The plaintiff joined his fences to that of the defendants', the Withers', some six or seven years prior to the alleged trespass; and if they did not expressly assent to it, (as to which there is no proof,) they *acquiesced* in it for the length of time aforesaid. After such acquiescence for so long a time, which ought, in our opinion, to amount to evidence of an approval of the act; it would certainly not only be a disregard of social and moral duty, but illegal to remove the plaintiff's fences and occasion the destruction of his crop, without reasonable notice to him to remove them himself.

The defendants pleaded *not guilty*, with leave to either party to introduce any special matter which might be specially pleaded. Under this state of the

record, the defendants had a right to introduce testimony to show that the *locus in quo* was their own soil and freehold; but then, the plaintiff also had a right to introduce any matter which would go to sustain a new assignment, or any special matter whatever which in law would sustain his action. And, even if it were conceded that the defendants, in removing the fences of the plaintiff, stood upon their own freehold, and that, under ordinary circumstances, they might have had a right to remove from their land, the rails of the plaintiff, jutting over upon their land, we have shown that, after so long an acquiescence in the joining of the fences, they had no such right, without reasonable notice to the plaintiff that they would acquiesce no longer, and that he must remove his fences. Indeed, it is our opinion that, if the *locus in quo* were the freehold of the Withers', the plaintiff, by the acquiescence of the Withers' in his enclosing and enjoying it from year to year, would be their tenant, or *quasi* tenant, and entitled to notice to remove his fences, before the defendants could have a right to do so.

The plaintiff proved that he and those under whom he claimed had been in possession of his land since about the year 1809; and this was sufficient to show title, (if it were necessary to show title at all,) independently of his title papers, which were read in evidence. And his possession was an actual possession at the time of the trespass complained of, at least to the extent of his enclosure. So that, his right to maintain his suit is clearly made out by the proof in the record.

The instructions to the jury, given at the instance of the defendants, are inconsistent with this opinion, except the one which instructed the jury that it was necessary for the plaintiff to have been in actual possession of the *locus in quo* at the time of the trespass complained of. It is unnecessary to express any opinion in regard to the instructions given at the instance of the plaintiff, as the Court, we presume, will have no difficulty, upon a return of the cause, in determining the

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proper directions to the jury from the principles of this opinion.

The judgment is reversed, and the cause remanded, with directions to set aside the verdict and judgment, and grant a new trial in accordance with this opinion.

Wintersmith for appellant; *Grigsby* for defendants.

CHANCERY.

December 23.

Case 89.

Crow vs Murphy, &c.

ERROR TO THE NELSON CIRCUIT.

Sureties. Contribution. Substitution.

JUDGE MARSHALL delivered the opinion of the Court.

A joint judgment was rendered against Crow & Harrison, who were sureties of Kincheloe; Harrison replevied the debt, with Murphy and others as sureties.—Held, that Crow, as original obligor with Harrison in the note and judgment, was not the principal of the sureties in the replevy bond.

Although the judgment was rendered against Harrison and Crow jointly, yet, as Crow did not join in the replevy bond, but it was executed by Harrison alone as principal, with Murphy and others as sureties, Crow as co-obligor or co-surety with Harrison in the original note, was not the principal of these sureties in the replevy bond, but they were the sureties of Harrison alone. The case of *Whitman vs Gaddy*, (7 B. Monroe, 591,) does not contravene this position. But as Harrison, by paying the bond himself, (if not by its execution and acceptance as a satisfaction of the judgment,) would be entitled to call upon Crow as a co-surety for such contribution as would equalize the loss; and as it is only through him and in his place that one of his sureties, by discharging the replevy bond for him, can become entitled to contribution from Crow, Murphy, who, as the surety of Harrison, has paid the replevy bond out of his own property, has a right, upon showing the insolvency of Harrison, to call upon his co-sureties in

the replevy bond, or such of them as may be solvent, to divide the loss. Or he may by substitution to the rights of Harrison, his principal, call on Crow for such contribution as Harrison himself would upon payment by him, have been entitled to. But as Harrison's right to contribution from Crow would depend primarily upon the insolvency of Kincheloe, who was their principal, his insolvency, and perhaps that of Harrison also, is an essential ground of the claim of Murphy upon Crow. And as Harrison could not call upon Crow for contribution without exhausting or at least accounting for any property of Kincheloe their principal, which may have been in his hands or under his control for his indemnity, for to the extent of such property Kincheloe as between these parties was not insolvent, (*Morrison vs Poynter*, 7 Dana, 310,) so Murphy can have no claim upon Crow but upon the same condition, and to the same extent of one half of the excess of the payment beyond the indemnity. And for contribution as to the other half, he must look to his co-sureties in the replevy bond.

In seeking contribution against Crow, Murphy subjects himself to all the equities, at least to all pertaining to this transaction, which Crow has against Harrison; and as the answer of Harrison, under and through whom he claims, shows that he had in his hands or under his control property of Kincheloe set apart for his indemnity in this transaction, there can be no recovery against Crow until that indemnity is exhausted or fully accounted for. Nor can Crow even then be made liable for the loss which Murphy may sustain as the surety of Harrison, if it be made to appear as Crow alleges, that he was not in fact the co-surety of Harrison for Kincheloe, but that as to him they were both principals. As the facts appear in this record, Crow must be assumed to have been the co-surety of Harrison, and liable for one-half of the excess of the loss beyond the available indemnity furnished by Kincheloe to Harrison. If the payment of about one half of the debt

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Judgment against two sureties, but not the principal one of the sureties replevies the debt, and his surety pays it. The surety paying the debt is not the surety of the defendant who refused or did not replevy the debt. And has no right to call upon him for contribution, unless his principal has such right, which he could not have without showing the insolvency of the first principal.

One surety has no right to call upon another for contribution until he shows the insolvency of the principal, which he cannot do whilst he has effects of the principal in his hands.

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made by Harrison to Murphy during the pendency of this suit were made out of his own means which is not probable, still the indemnity must be accounted for before it can be ascertained what Crow should contribute to equalize the loss. Or if the payment were made from the indemnity itself, which is probable, or from other means furnished by Kincheloe, and if it could be assumed (which cannot be done,) that this payment exhausted the indemnity, still as Crow would in no event be liable for more than one half of the residue, the decree against him for the whole, is for too much, and therefore erroneous.

But the radical error is in decreeing against him, when the insolvency of Kincheloe, of which he requires proof, has not been established; and when no account has been given of the indemnity furnished by him to Harrison to the extent of which he was not insolvent. But as upon the hypothesis that Crow was a co-surety with Harrison, it is probable that something may be due from him, the case will be left open for further preparation by proper pleadings and proof as to the insolvency of Kincheloe, or to the disposition of the indemnity, and as to the fact whether Crow was a co-surety with Harrison for Kincheloe, and for any other matters afflicting the equities of the parties.

Wherefore the decree is reversed, and the cause remanded for further proceedings consistent with this opinion.

Grigsby for plaintiff; *Riley* for defendant.

Fauntleroy's Heirs vs Henderson.**EJECTMENT.****ERROR TO THE RUSSELL CIRCUIT.****Case 88.*****Ejectment. Decrees. Landlord and tenants. Possession.*****CHIEF JUSTICE SIMPSON** delivered the opinion of the Court.***December 24.*****Case stated.**

IN June, 1786, James Harrod, exhibited a bill in chancery, in the old Supreme Court, for the district of Kentucky, against John Crow, to compel him to surrender the legal title to a part of four hundred acres of land, to which the complainant claimed to have the superior equity. The suit was afterwards removed to the Danville district Court, and upon the abolition of that Court, to the Lincoln Circuit Court, where it was tried; and a final decree rendered in favor of the complainant in 1805. At the time the decree was rendered the original parties to the suit had both died. The complainant Harrod, died leaving but one child a daughter, named Margaret, who after her father's death, viz: in the year 1802, intermarried with John Fauntleroy. Crow's heirs being dissatisfied with the decree, appealed to this Court, and in 1808, the decree of the Circuit Court was reversed, on the ground that it had directed the claim of Harrod, to be surveyed in an illegal and improper manner, but the equity of the complainant to so much of the land in contest, as might be embraced by the claim, when correctly surveyed, was sustained: (*Hardin 435.*)

When the case returned to the Circuit Court, and a survey was made in conformity with the opinion of this Court, it appeared that the complainant's claim, and Crow's claim interfered to the extent of one hundred and seventy acres, and thereupon at the August term, 1809, a decree was rendered, directing the defendants to convey the legal title to the interference, to John

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Fauntleroy and wife. The decree also appointed commissioners to assess rents and value improvements. At a succeeding term of the Court, the decree was so altered, that the conveyance of the legal title to the land, was required to be made by Crow's heirs, to Margaret Fauntleroy alone, in whose name, the suit had been revived after the death of her father.

Under this decree, the commissioners who were appointed to value the rents and improvements, reported a balance in favor of Crow's heirs of seven thousand and ninety-five dollars and eighty-five cents. To this report exceptions were filed by the complainant, but were never passed upon by the Court. At the May term, 1811, the suit was ordered to be dismissed by the direction of the complainant.

Margaret Fauntleroy, who as before mentioned, was the only child and heir at law of James Harrod, and also entitled as devisee, under his will, to his interest in the land claimed in the suit against Crow, died in the year 1841. In the year 1843, after her death, her heirs at law, sued out a writ of error, to reverse the order of the Circuit Court, dismissing the suit against Crow's heirs. This Court however, refused to reverse it, and the decree of the Circuit Court dismissing the suit was affirmed: (5 *B. Monroe* 136.)

John Crow was in possession of the land in contest, before the year 1799, and those claiming under him have been in the possession of it ever since. His patent bears date in 1782. It is not deemed necessary to specify in detail, the several sales and conveyances, made by Crow, and those claiming under him. It is considered sufficient to state, that Henderson, the defendant in the present suit, was at the time it was instituted, in the possession of a part of the land, that Crow's heirs were required to convey to Margaret Fauntleroy by the aforesaid decree.

At the time the suit was dismissed, a part of the one hundred and seventy acres of land was claimed and possessed under Crow's claim, by Daniel McIlvoy, and

the remainder of it by John Cochran. A few days before the dismissal was made, a written agreement was entered into by John Fauntleroy and Margaret his wife of the one part, and Daniel McIlvoy and John Cochran of the other part, the object of which was, as expressed on the face of the instrument, to settle all disputes between Harrod's heir and the heirs of John Crow. It was stipulated in this agreement, that Fauntleroy and wife should relinquish unto Daniel McIlvoy and John Cochran all their right and title and claim to the land in dispute between the heir of James Harrod, dec'd., and the heirs of John Crow, dec'd., being the same land decreed to the heir of Harrod in the Court of Appeals, it being as recited for the bonds given by James Harrod to Stephen Lankford, and transferred by Lankford to John Crow, dec'd., for twelve hundred acres of land in Jefferson county, when the bonds were executed, also a bond for a half acre lot adjoining the town of Danville, and that the suit in chancery should be dismissed. The suit was accordingly dismissed, and in July 1812, a deed was made by Fauntleroy and wife, in pursuance of the agreement of compromise, to Daniel McIlvoy for that part of the land claimed and held by him under Crow. But the clerk of the County Court in his certificate, states, that Mrs. Fauntleroy, upon privy examination relinquished her right of dower in the land. The authentication is therefore defective, and the right of Mrs. Fauntleroy to the land did not pass by the deed.

It appears from the record and proceedings in the suit of Harrod's heir against Crow's heirs, and the agreement of compromise between Fauntleroy and wife, and McIlvoy and Cochran, that Harrod in his lifetime had executed to Stephen Lankford bonds for twelve hundred acres of land, situated at the date of the bonds, in the county of Jefferson, as it was then bounded, and that the bonds had been assigned by Lankford to Crow, and had passed into the hands of McIlvoy and Cochran, as Crow's sub-vendees, who agreea-

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bly to the terms of the agreement between the parties, were to surrender these bonds to Fauntleroy and wife.

John Fauntleroy died in 1845. In the year 1848, this action of ejectment was brought against the defendant by the heirs at law of Margaret Fauntleroy, deceased, for a small portion of the land that was in controversy in the aforesaid suit against Crow's heirs, being a part of that embraced in the deed from Fauntleroy and wife to Mellvoy, under whom the defendant claims.

The facts here detailed were proved upon the trial by the lessors of the plaintiff. The Court instructed the jury to find for the defendant, as in the case of a non-suit; and a verdict having been given, and a judgment rendered in his favor, the heirs of Margaret Fauntleroy have prosecuted this writ of error, and insist that the instruction of the Court was erroneous.

The ground of plaintiff mainly relied on for recovery.

The decree in the suit of Harrod's heir against Crow's heirs, and the deed from Fauntleroy and wife to Mellvoy, are mainly relied upon by the plaintiffs in error as manifesting their right to a recovery in this case.

A decree directing a conveyance of land does not pass the legal title, (*Mummy &c., vs Johnson &c., 3 Marshall, 220*)

It is well settled, that a decree directing a conveyance of land to a complainant, does not invest him or her with the legal title, until a conveyance is executed; *Mummev, et al. vs Johnson et al., (3 Mar. 220.)* The decree itself, therefore, did not enable the heirs of Mrs. Fauntleroy to maintain an action of ejectment. The record of the suit in which the decree was rendered, shows that her right to the land was a mere equitable one, and that the legal title was in Crow's heirs.

A conveyance in obedience to a decree directing a conveyance, may be presumed where there has been a continued possession in the person to whom

It is however, contended that the jury might have presumed the execution of the decree by a deed of conveyance upon the part of the defendants, after the lapse of such a long period of time. Such a presumption would not only be admissible, but peculiarly proper under certain circumstances. If the party in whose favor a decree for a conveyance of land was rendered

continued in the possession of the land, and derived from the decree every advantage and benefit it was designed to confer, the legitimate presumption would be, after so long a time had elapsed, being about thirty-eight years, that the decree had been complied with. But the circumstances in this case are entirely different, and absolutely prohibit the indulgence of any such presumption. In the year following that in which the decree was rendered, the suit was compromised by the parties, and dismissed by the complainant. The benefit of the decree was surrendered, and the right to the land yielded to the defendants in possession. The defendants after this arrangement was made, did not consider themselves under any obligations to comply with the decree, nor could it, after the dismissal of the suit, have been enforced by the complainants, if at all, without another suit for that purpose, based upon such facts as would have entitled her to claim the benefit of the decree, notwithstanding the suit had been dismissed. How then could a presumption arise, that the legal title had been conveyed to Mrs. Fauntleroy in compliance with the decree, when the parties themselves did not contemplate its execution? The facts repel any such presumption. The defendants had the possession and the legal title. The suit when pending and undetermined, had been compromised by the parties, and dismissed by the complainant, with the avowed purpose of annulling the operation of the decree, and permitting the defendants to retain the title and possession of the land in contest, their title to which, was to be perfected by a conveyance of the equity of the complainant Margaret Fauntleroy. The subsequent lapse of time cannot create a presumption, that is clearly inconsistent with the avowed intention and understanding of the parties, so fully and explicitly developed by the whole scope and design of the arrangement between them, and by the terms of their contract of compromise.

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that conveyance is directed to be made—but not where the possession continues with the other party.

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It appears that after the decree was rendered, and before the suit was dismissed, an order was obtained on the motion of the complainants, awarding an attachment against the defendants Cochran and wife, for refusing to execute a deed of conveyance as directed by the decree. As such an order had been obtained, the presumption legitimately arises, as it is contended, that a deed was executed in fulfillment of the requisitions of the decree, before the order of dismissal was entered. The argument is, that as the attachment was only awarded against part of the defendants, the fair inference is, that the other defendants had previously complied with the decree; and as the attachment awarded was never issued, the additional inference is authorized, that the defendants against whom it was ordered, had made a conveyance without any further compulsion. It must be recollected however, that these inferences are deduced not from any thing done by the defendants, but from the act of the complainants; and also that they can derive no aid from the time that has elapsed since the suit was dismissed. To apply to them, therefore, a fair test, let us suppose that an action of ejectment had been brought by Fauntleroy and wife against the tenants in possession immediately after the time the suit was dismissed, and the decree and order referred to, had been alone relied upon, to show title in Mrs. Fauntleroy. Would a jury have been authorized to presume that Crow's heirs had conveyed the legal title in compliance with the decree? There would have been no foundation for such a far-fetched and remote presumption, and it would have been wholly inadmissible. The decree only required an immediate conveyance to be executed by the adult heirs, there being three of them, two of whom were married women. A conveyance by the infant heirs was decreed to be made by them, as they respectively attained the age of twenty-one. It does not appear that any one of the infant defendants had arrived at full age and been in default, at the time the suit was dismissed. A

deed executed by the *femas covert* would not have passed the title to the grantee, unless it had been legally recorded. Under such circumstances, a presumption that the decree had been complied with, and a deed executed, although it was not produced, founded alone upon the act of the complainants, in having obtained an order for an attachment against one of the heirs and her husband, which had never been sued out, would have had no foundation to rest upon, and have been clearly unauthorized. The jury therefore, could not upon this ground, have legally and properly presumed that the title had been conveyed to Margaret Fauntleroy, and had descended to and vested in her heirs upon her death.

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It is admitted that as a general rule, a plaintiff in an action of ejectment must have the legal title to the land claimed, to enable him to recover. But it is contended, that in this case, as the defendant claims under McIlvoy he is estopped by the article of agreement between Fauntleroy and wife, of the one part, and said McIlvoy and Cochran of the other part, and the deed in pursuance thereof made by Fauntleroy and wife, to McIlvoy, to deny that Mrs. Fauntleroy had title; and that consequently, it is immaterial to the right of recovery of the plaintiff's in error, whether the legal title had or not, been conveyed to her by Crow's heirs.

The following recitals in said writings are relied upon as creating the estoppel.

"Know all men my these presents, that we John Fauntleroy and Peggy his wife, of the county of Mercer and State of Kentucky, have sold and relinquished unto Daniel McIlvoy and John Cochran, of the town of Danville, and State aforesaid, all our right title and claim, to the land in dispute between the heirs of James Harrod deceased, and the heirs of John Crow deceased, adjoining the town of Danville, or in Danville, and which was decreed to the heir of said Harrod, in the Court of Appeals, it is at this time in the Lincoln Cir-

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cuit Court. We bind ourselves, our heirs, executors, administrators, and assigns to convey the said land to Daniel McIlvoy and John Cochran, their heirs &c. This is a part of the article of agreement, executed by the parties."

The language of that part of the deed that is supposed to have a bearing upon the question, is as follows:

"That for and in consideration of the sum of one dollar, by the said McIlvoy, to said John Fauntleroy, and Margaret his wife in hand paid, the receipt whereof they do hereby acknowledge, and for divers other valuable considerations named in certain articles of agreement made and entered into the 8th May, 1811, as the same bears date, by and between the said John and Margaret and Daniel McIlvoy and John Cochran, they, the said John Fauntleroy and wife, have bargained and sold, and by these presents do bargain, sell, and convey unto the said Daniel McIlvoy and his heirs forever, a certain tract or parcel of land situate in and contiguous to the town of Danville, in the county aforesaid, containing by survey 105½ acres, 68 poles, and 27 square feet, *it being the land decreed by the Court of Appeals, to Harrod's heir, and bounded as follows, &c., viz:*

The statement that the land contained in the deed, and in the agreement of compromise, was the same land that was decreed by the Court of Appeals to Harrod's heir, is relied upon as an admission that Margaret Fauntleroy had the title to it, and as concluding the defendant in this case, from alleging the contrary. But such an implication does not necessarily arise from the language used, even unexplained, by a reference to the decree itself. It may have been decreed to her, and still the title have been in the defendants. It at most only admits the existence of such a decree; but the decree itself must be examined, in order to ascertain the character of the right of Harrod's heir to the land. In looking to it, her right to the land is ascer-

tained to have been an equitable one merely. The admission that such a decree was rendered, cannot with any propriety be construed to mean that she had any other right or title to the land, than that which is manifested by the decree. There is nothing contained in the writings therefore, which operates as an estoppel on the defendant to show that her right to the land was an equitable one merely, that she was not invested with the legal title, and that therefore her heirs cannot maintain an action of ejectment for the land.

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The plaintiffs in error, however, rely upon another point, which they contend is conclusively in their favor, and entitles them to recover, under the facts in this case. It is, that since the execution of the deed by Fauntleroy and wife to McIlvoy, the grantee, and the defendant who claims under him, have held under the title of Margaret Fauntleroy, and that the defendant's attitude precludes him from the right to contest her title.

In support of this proposition it is urged, that the decree in favor of Harrod's heir was tantamount to an eviction of the tenants in possession from the land by her, and they having procured a deed from her husband and herself purporting to convey her title, must be regarded as holding under it since that period, and occupying substantially, the relation of landlord and tenant, so far as the title of the land is concerned.

On the other hand, it is contended that this doctrine only applies to cases where the defendant has obtained the possession of the land from the plaintiff, and that it has no application to a case like the present, which was in reality the purchase of an outstanding claim, made for the purpose of terminating a vexatious controversy.

The relation however, of landlord and tenant may exist where the possession of the land has not been obtained from the landlord, or under his title. A hostile possession may be changed into an amicable one by the agreement of the parties. But to have this effect,

A hostile possession may be changed into an amicable one by the agreement of parties, but to have that effect it should clearly

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appear that the title of the claimant is recognized and a right to the possession also. And it also appear that the tenant has the right to assume that relation, not owing allegiance to any other person or landlord: *Higginbotham vs Fishback*, 1 *Marshall* 506 *Botts vs Shields*, 3 *Litt.* 34. An agreement to become tenant is the only means by which he becomes so with the purchaser of an adverse title.

the agreement should contain a clear recognition of the claimant's title to the land, and a right to the possession of it, and the defendant must also have a right to assume the relation of tenant. In the cases referred to by the counsel of the plaintiffs in error, in support of the doctrine contended for on this point, agreements were made between the parties, by which the person in possession became by express contract the tenant of the other party, and agreed to hold the land under him in that character. In such cases, no doubt can exist of the intention of the parties, and the only question that can be made, relates to the right of the tenant in possession to make such an agreement and to convert a hostile into an amicable possession. If he claim the land as his own, and holds no person responsible for the validity of his title, he may if he choose surrender the possession to an adverse claimant, or enter into an agreement admitting the superiority of his title and change his hostile possession into one that is amicable. If, however, he owes allegiance to the title under which he holds the possession, the law does not permit him voluntarily to renounce it, but he is under obligations to adhere to it until it has been legally ascertained that such title is not sufficient to afford him protection against the adverse claim. An occupant by purchasing an adverse claim does not change the character of the possession: *Higginbotham vs Fishback*, (1 *Mar.*, 506.) *Botts vs Shield's heirs*, (3 *Lit.* 34.) This effect is produced only by an agreement that the occupant shall become the tenant of his vendor, and hold the possession under his title, and not merely by the purchase of an outstanding superior title.

The intention of the parties is to govern in regard to a purchase of another title by one in possession. If it is to guard a possession already acquired, it cannot be to become tenant of the holder of the title purchased.

The effect in this case, of the contract and conveyance alluded to upon the character of the subsequent possession of the defendants must be determined by the intention of the parties, and their rights and attitude at the time the agreement was entered into by them, and the terms and stipulations, and object of that agreement.

The equitable right to the land was decided to be in Margaret Fauntleroy. The defendants had the legal title and the possession, and a claim for improvements that was undetermined. They were directed to convey the legal title to Mrs. Fauntleroy, but the decree did not order them to surrender the possession to her. According to equitable principles, they had a right to retain the possession until they were paid for the improvements, and had a lien upon the land to secure the payment. But looking to the decree as it was rendered, without regard to general equitable principles, it is apparent that the defendants were not required by it to surrender the possession of the land, and that it did not amount to a decree of eviction. Without an additional decree or some further legal proceeding, the complainant could not have obtained the possession of the land. The defendants had a right to retain it, and by so doing, were not disobeying or disregarding either the letter or the spirit of the decree. There was nothing in the decree upon which a writ of *habere facias* could have issued, to give to the complainant the possession of the land. It is not, therefore, deemed necessary to decide what the legal effect of the contract of compromise and conveyance made in pursuance thereof, would have had upon the character of the subsequent possession of the defendants under the circumstances of the case, if the decree had required them not only to convey the title to the complainant, but also to deliver to her the possession of the land.

The litigation between the parties had not been terminated. The controversy was in an attitude which not only permitted a compromise to be entered into by the parties, but which may have made it peculiarly appropriate, and apparently desirable on the part of the complainant. The question is not as to the validity or extent of the defendant's claim for improvements. The claim was made and unsettled, and appeared to be of very considerable magnitude. The matters in controversy between the parties had been only partially

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decided by the decree that had been pronounced. While the contest remained in this condition, the compromise was made, and the suit dismissed. The obvious intention of the parties was, that the legal title of the defendants should be perfected by the acquisition of the outstanding equitable title, and that the complainant should surrender all claim to the land that had been in controversy. The transaction gives no color to the inference, nor authorizes in any degree, the assumption that the defendants were to hold the possession of the land under the title of the complainant, or that the character of their possession was to be changed by the arrangement. They held the possession under an adverse claim, having the elder legal title. But as the superior equitable title was in Margaret Fauntleroy, it required the union of both titles to give them a complete right to the land. They still retained their own title, and attempted to procure the other. By the contract of compromise, it manifestly and conclusively appears that their object was to procure the complainant's right to render their own title valid; and there is nothing in any part of the transaction indicating an intention on their part to hold the possession of the land under her title, or an expectation or belief on the part of her or her husband, that it was to be thus held, nor did the arrangement produce such a legal effect upon the character of their possession.

The legal title
necessary to
maintain object-
ment.

The suit was compromised and dismissed for the purpose of adjusting not only the matters of controversy which it involved, but also other matters originating out of claims held by the defendants against the estate of James Harrod, the father of the complainant; and for the payment of which, the estate which had descended to her was liable. The surrender of these claims may have been a fair and full equivalent for her right to the land embraced in the decree, and if so, she sustained no prejudice by the dismissal of the suit, which was evidently done with her knowledge and consent, although the deed which she and her husband attempted

to execute, did not in consequence of the unskilfulness of the clerk, before whom she acknowledged its execution, have the legal effect to convey her title to the grantee. But whether or not, as her title to the land was merely an equitable one, it could only have been asserted by her in a Court of equity; and if the compromise and dismissal of the suit under the circumstances, did not preclude her from seeking relief by another suit, her remedy would have been by an appeal to the chancellor. Her heirs occupy her position and are only invested with her right, and as it was equitable merely, they could not maintain this action of ejectment for the land in contest.

Wherefore the judgment of the Circuit Court is affirmed.

Bradley and Hewitt for plaintiffs; *Harlan, Barbour, and Bell* for defendant.

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vs
MARSHALL'S
ADM'R.**

Marshall vs Marshall's Ad'mr.

ERROR TO THE SPENCER CIRCUIT.

Evidence. Practice.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

THIS was a suit by petition and summons, commenced in April 1850, on a note for five hundred dollars, bearing date December, 1830, and payable to the plaintiff's intestate, twelve months after date.

The defendant filed pleas of *non est factum* payment, and no consideration, upon which issues were made up by the parties, and a trial had, which resulted in a verdict for the plaintiff.

DEBT.

Case 89.

December 24.

Case stated and
pleadings.

12bm459.
111 146

**MARSHALL
vs
MARSHALL'S
ADM'R.**

Certain evidence was introduced by the defendant before the jury upon the trial, which the Court excluded from their consideration, and the propriety of the action of the Court in that respect, is the question now presented for our determination.

It was proved upon the trial that the plaintiff's intestate and the defendant were brothers, that the signature to the note sued upon, was in the hand-writing of the defendant, that the plaintiff's intestate was much embarrassed and pressed for money, from a period antecedent to the date of the note sued on until the time of his death, which occurred in the year 1849, and had been a money borrower for the last thirteen or fourteen years of his life, and that nearly all of his property had been sold and subjected to the payment of his debts during his lifetime; and that the defendant had been, all the time, since the date of the note sued on, full-handed, in easy circumstances, and able to pay all his debts.

The defendant introduced several witnesses, who proved that they were intimately acquainted with Josiah Marshall, the plaintiff's intestate, from a period prior to the date of the note sued on, until his death, and with his affairs and business transactions, and that they had never known or heard of his having sold any property, or loaned any money to the defendant, or of any trading between them or of any debt due from the defendant to his brother Josiah. Some of the witnesses also proved that they were the securities of Josiah Marshall for money he had borrowed after the year 1835, and had conversed with him in relation to his means to pay his debts, and assisted him in making arrangements for that purpose, and had never heard him speak of any debt due to him from the defendant. This was the evidence which was excluded by the Court.

The evidence thus excluded, was clearly competent.

The fact that Josiah Marshall, who was embarrassed in his circumstances, and compelled to sell his property to pay his debts, did not, in enumerating to his intimate

The fact that a creditor had been embarrass-

friends his means and resources for the payment of his debts, allude to or mention a debt due to him by the defendant, furnished a strong presumption, either that the note sued on had never been obligatory, or if it had, that it had been paid off. The conduct of a party who knows the truth of a fact, or is presumed to know it, is always evidence against himself, and when he is placed in a position where if he acted as men usually do, under the influence of similar motives, and in like circumstances, he would not remain silent; if he fails to speak, his silence affords a presumption against him. As for instance, where the existence of the debt, or of the particular right has been asserted in the presence of a party and he has not contradicted it. So in the present case, where the party undertook to enumerate his means to pay his debts, his silence upon the subject of the debt in contest, affords a presumption that he did not consider it available, and as the defendant was able to pay it, the character in which he regarded it, must have resulted either from the fact that the note had been paid off, or that it had never been obligatory. The testimony also of witnesses who were acquainted with the parties, and had an intimate knowledge of their business transactions, and who, therefore, in all reasonable probability, would have heard of the creation or existence of the debt in contest, had it been valid and enforceable, that they had never heard of it or known of its existence, was competent, and created some presumption against the validity of the debt. Such testimony should be admitted, leaving the jury to determine under all the circumstances, the weight to which it may be entitled. Evidence to be excluded from the jury, should be clearly irrelevant to the issue; any circumstance from which the jury may infer a material fact, should be left to them. 1 *Marshall*, 3 and 19.

The Court should not have excluded this evidence, and should have given the instruction asked for by the defendant, that if the note sued on was not founded on

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ed for a number of years, and during that time in enumerating his resources for means amongst his friends had never been heard to mention a debt of as much as \$500 now claimed by one who was always able to pay it, was competent testimony to go to the jury conducing to show that the debt claimed, if ever due, had been paid.

Evidence conducing to prove a fact in issue should not be

EICHART
vs
BARGAS &
WIFE.

excluded from
the jury: 1 Mar.
8 and 19.

a good or valuable consideration, the law was for the defendant.

For the error of the Court in excluding this testimony and instructing the jury to disregard it, and for refusing said instruction asked for by defendant, the judgment is reversed, and cause remanded for a new trial and further proceedings consistent with this opinion.

B. Hardin for plaintiff; *Wickliffe* for defendant.

FORC. DET.

Eichart vs Bargas and Wife.

APPEAL FROM THE JEFFERSON CIRCUIT.

Case 90.

Landlord and Tenant. Re-entry.

December 29. CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

Case stated.

THIS was a warrant for a forcible detainer sued out by Bargas and wife, against Eichart. The inquest of the jury was in favor of the defendant. The plaintiffs traversed the inquest, and upon the trial in Court, the jury found the defendant guilty of the forcible detainer complained of. The Court entered a judgment of restitution, and the defendant has appealed.

The plaintiffs read as evidence upon the trial, a lease in the following words, viz:

"Caroline Huber leases unto Daniel Eichart for the term of three years, from and after the 25th September 1850, for and in consideration of the covenants and agreements on the part of said Eichart, hereinafter mentioned, the shop lately used by John Huber, now deceased, on the West side of Brook street, between Main and Market, in Louisville, Ky., and the yard—reserving to herself the use of the yard to put fuel in, access and use of the back buildings.

"For the rent of which, the said Eichart promises to pay to said Caroline, six dollars and twenty-five cents per month at the end of each month during this lease; and said Eichart is to keep said shop and the premises rented to him, in good repair, and to deliver the same to said Caroline at the end of the lease in as good repair as the same are now, usual wear, natural decay, and casualties excepted. If the said shop should be destroyed by fire, without any fault on part of said Eichart, then he may surrender the lease, and pay only what rent shall be then due. If said Eichart shall at any time fail for ten days to pay the rent of any month, after the same shall become due, then the said Caroline may, without process of law, take possession of said shop and premises, and hold the same, or if she shall so elect she may bring suit for forcible detainer, and eject said Eichart from the shop and premises, and the bare non-payment of the rent for ten days after due, shall be sufficient to enable her to maintain said suit without giving notice.

EICHART
vs
BARGAS &
WIFE.

Witness our hands and seals, this 25th Sept. 1850.

CAROLINE HUBER, [L. S.]

DANIEL EICHART, [L. S.]

The marriage of Caroline Huber to the plaintiff Bargas, and that one month's rent falling due on the 25th day of July, 1851, was unpaid, and that on the 6th day of August thereafter, the ten days having then elapsed, Bargas and wife demanded possession of the leased premises, which the defendant refused to surrender, were facts also proved upon the trial.

The defendant moved the Court to instruct the jury, that before a condition of re-entry can be taken advantage of by a lessor, he must demand the rent on the day it is payable on the leased premises, where no other place of payment is fixed by the lease. The Court refused to give that instruction, and the question to be determined is, whether or not it should have been given.

Ex parte
as
Barnes &
Wicks.

To enable a landlord to avail himself of the remedy by re-entry for the non-payment of rent, demand must be made on the day the rent is payable, and at the most notorious place on the premises, if no other place is designated: *Tillinghast's Adams*, 161. (7 *Bacon*, *Title Rent*, 28.) But when the right of re-entry is stipulated for, without demand, defendant is bound to show readiness to pay when due: 7 *Bacon*, *Title Rent*, 28.

A stipulation in a lease that the bare non-payment of rent for 10 days after due, shall give a right to sue without notice, will be sufficient to dispense with the necessity of demand or notice before bringing forcible detainer.

. There is a material difference between a remedy by re-entry, and any other legal remedy for the non-payment of rent, no demand being necessary except in the case first mentioned.

. . . But the doctrine is well settled, that to enable a landlord to avail himself of a remedy by re-entry for the non-payment of rent, a demand of the rent must be made on the day it is made payable, at the most notorious place on the leased premises, unless a place is appointed where the rent is payable, in which case the demand must be made at such place: *Tillinghast's Adams*, 161. (7 *Vol. Bac. Ab.*, *Title Rent*, 26. But when the right of re-entry is given to the lessor without any demand, then the lessee has undertaken to pay it whether it be demanded or not, and as he has dispensed with the demand, he is required to make actual proof that he was ready to tender and pay the rent when due: 7 *Bacon's abridgement*, *same title*, page 28.

If then, by the terms of the lease, a demand was dispensed with, proof that a demand had been made was unnecessary. Unless however, it was dispensed with, it was incumbent on the plaintiffs in the warrant to prove that the rent had been demanded on the leased premises on the last day allowed for its payment.

By the terms of the lease, a failure of the lessee for ten days to pay the rent of any month, after it became due, gave to the lessor a right of re-entry, and if the lease had not contained any other stipulation, a demand of the rent on the leased premises on the tenth and last day, would have been necessary. But the lease contains an express stipulation, that "the bare non-payment of the rent for ten days after due, shall be sufficient to enable her to maintain said suit without giving notice." This part of the lease was not made for the purpose of giving to the tenant ten days after the expiration of the month to pay the rent—that had been done by a previous clause in the lease. The parties intended to effect some other object by its insertion. It was evidently designed as a dispensation of every act

on the part of the lessor, which otherwise would have been necessary to have enabled her to avail herself of the right of re-entry. The bare non-payment of the rent for ten days after it became due, was to be sufficient to enable her to maintain her suit for forcible detainer, without giving any notice. If, however, a demand of the rent was still necessary, then a bare non-payment of the rent for ten days after it became due, did not enable her to maintain her suit, but the law imposed on her an additional duty contrary to the express stipulation of the parties contained in the lease. The natural import of the language used, is, that the bare non-payment of the rent for ten days after it falls due, shall be of itself, without any notice or demand to pay the rent, or to surrender the premises, sufficient to enable the lessor to maintain her suit. Such, we are convinced, was the intention and understanding of the parties, and this construction of the lease will carry their intention into effect. The Court, therefore, did not err in refusing to give said instruction.

Wherefore the judgment is affirmed.

Pilcher and Hauser for appellant; *Harrison* for appellee.

*Piper
vs
Meniffee.*

Piper vs Meniffee.

ERROR TO THE NICHOLAS CIRCUIT.

Physicians. Assumpsit. Evidence.

JUDGE MARSHALL delivered the opinion of the Court.

THIS action of assumpsit was brought by Meniffee, a physician, to recover the amount of his bill for medi-

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ASSUMPSIT.

Case 91.

December 29.

Case stated.

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cal services, &c., to the defendant and his family. The case went to trial on the general issue, and after the plaintiff had proved his account, it was proved on the part of the defendant, that on the first visit of plaintiff to attend the defendant, he was sent for while at the defendant's house, to go to one Hoffman's, and was then told by the wife of defendant who was himself very ill, that if he went to see patients that had the small pox he must not come there, but they must employ another physician who had no small pox patients, to which he replied, "he would not, unless Hoffman would be bound for his fee;" that on the next day when he visited defendant again, he was again told by defendant's wife that if he visited any small pox patients he could not attend on defendant, and he replied he would not visit any small pox patients. That about ten days after he was called in, the defendant's wife was pressing him strongly about visiting small pox patients, and that he must not visit them, when without admitting or denying that he visited such patients, he said if he visited them he would change his clothes and there would be no danger. It was further proved that after the plaintiff had been attending the defendant for about three weeks for fever, and when he was getting better and began to recover from the fever, he broke out with small pox, and some time after his son also broke out with small pox. The defendant then introduced witnesses and offered to prove by them that while the plaintiff was attending on the defendant as above, for typhoid fever, he was also attending on small pox patients at Hoffman's, and to prove other facts conducing to show that the plaintiff by his visits to the defendant, had brought with him and communicated to the defendant the small pox infection, and that there were no other means by which it could have been communicated to him. But the Court on the motion of the plaintiff's counsel excluded or rejected all the evidence proving or conducing to prove the facts or any of them, which the defendant thus offered to prove. And exceptions

to this decision of the Court having been properly taken and reserved, the only question presented in this Court, is, whether the facts offered to be proved were relevant and material to the issue.

It cannot be doubted, that upon the facts offered to be proved, and which are now to be taken as true, the plaintiff was *prima facie* liable to an action. Even if there had been no warning to him by the defendant's wife, it was his duty in passing from his patients who were afflicted with an infectious and dangerous disease to others who were not so affected, to take such precautions as experience may have shown to be necessary to prevent the communication of the infection by his own visits. But when in the very commencement of the services for which a considerable portion of the charges now in question were made, he was expressly warned by the defendant's wife, acting presumably for her husband as well as for herself and the rest of the family, that if he attended small pox patients, he must not come there, but they would employ another physician, his promises of compliance, constituting as they did, the inducement and condition of his further employment, entered into and formed a part of the consideration of the contract on which he sues. And whether they be regarded as being in the nature of a warranty, that the family should not be subject to the risk of small pox by his visits, or as having been intended to lull their apprehensions; and thus to procure a continuance of his employment by a delusive statement, their violation and the consequent damage, constitute in our opinion, an available ground for reducing the recovery for the services, in the performance of which, the violation of these promises and the consequent damage occurred. After the conversation which occurred during the first and second visits of the plaintiff, the defendant and his family had a right to believe that the plaintiff was not visiting small pox patients, since he had in effect, promised that he would not visit the defendant while he was attending on such patients, or that he would not attend on such patients while he was visiting the defendant.

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vs
MEXIER

It is the duty of physicians who are attending patients infected with infectious diseases when called to attend other patients not so infected, to take all such precautionary means as experience has proved to be necessary to prevent its communication to their patients: See *Chitty on contracts*, 1563, referring to 9 Conn. Rep. 209, 3 Watts 355.) The fact that a physician who was called in, was warned that if he was attending any patients infected with small-pox, that his services would be dispensed with and another employed and he failed to deny that he was attending such patients, and promised not to do so, but continued to attend, and did communicate the small pox to the patient, was proper evidence to go to the jury on a suit to recover the charge for attention—to recover the damages.

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vs
MERIFFER.

A physician who communicates to his patient an infectious disease is responsible for damages for the suffering, loss of time and danger to which the patient may be subjected—argu.

Suppose a physician, knowing that he has an infectious disease, continues to visit his patients without apprising them of the fact, and without proper precautions on his own part, and thus communicates the disease to one of them? Clearly the physician thus acting would be guilty of a breach of duty, and of his implied undertaking to his patient, which, whether it be regarded in the light of carelessness, or negligence, or fraud, would render him liable for the consequent damage, including as well the suffering and danger, and loss of time, as the expense necessarily occasioned by the second disease, thus produced by his own wrongful act. And if the same physician should cure his patient of the second disease, he would be but compensating in part the damage which he had occasioned, if he rendered his services gratuitously. Might not the patient then resist or at least reduce his recovery for the services by showing that they had been rendered necessary by the plaintiff's own wilful misconduct and mistreatment as a physician in his attendance upon the same patient? And might he not resist or reduce the recovery in an action for the original services alone, by showing the misconduct and mistreatment in rendering those services, whereby the patient passed from the first disease into one equally or more dangerous?

The modern doctrine allows a defendant in an action of assumpsit to remit or reduce a recovery on the ground of a breach of warranty or a false and fraudulent representation in the same contract—argu: See *Culver vs Blake* (6 B. Mon. 528) as a physician called to attend a patient for fever, and communicating small-pox to his pa-

The actual case as presented by the evidence which was offered, is even stronger for the defendant than that which has been hypothetically stated, inasmuch as it may be inferred that the continuance of the plaintiff's employment in the first disease was induced by his promise not to visit small pox patients while he was visiting the defendant. And although under the doctrine formerly prevailing, the defendant might be driven to a cross action for the recovery of damages, yet as more modern adjudications with a view to avoiding circuitry of action, and doing full justice in one suit, have allowed the defendant in an action of assumpsit to resist or reduce the recovery on the ground of a breach of warranty or of false and fraudulent repre-

sentations in the same contract, so upon the same principle, we are of opinion that the facts offered to be proved in this case, being a part of the very transaction and contract on which the recovery is claimed, and tending to prove maltreatment on the part of the plaintiff in his attendance on the first disease, whereby his services in that disease were rendered less valuable, and whereby another disease was produced, for his services, in which he has no just claim to compensation except in reduction of damages claimed against himself, are admissible and material, not by way of set off, but as affecting the cause of action itself, and as a ground of diminishing or defeating his recovery, so far as his demand is founded upon services rendered either in attending on the defendant and his son in the small pox, or in attending on the defendant in his prior disease, in violation of his promise not to attend small pox patients while attending the defendant. Indeed there is some ground for saying that his right to charge the defendant for attendance on the first disease, was made expressly dependent upon his not visiting small pox patients.

In considering the question upon the rejection of this evidence, we of course take the strongest presumption against the plaintiff which the rejected evidence authorizes. In deciding that the evidence was admissible, we only decide that the facts offered to be proved and the inferences deducible from them, are entitled *prima facie*, to affect the damages recoverable by the plaintiff, who, if the evidence had been admitted, would have had and will have upon another trial, the privilege of disproving the facts relied on, or of offering such explanatory or mitigating evidence as may be in his power. As we have no right to anticipate his answer, it would be inappropriate to say any thing as to the effect of any particular answer which he may attempt.

In support of the principle of this opinion, we refer to the case of *Culver vs Blake*, (6 B. Mon. 528,) which allows proof of breach of warranty or of fraudulent

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plaintiff may have his bill reduced, by proof showing that longer attention was necessary and the bill in consequence of the small-pox being communicated—*Chitty on contracts, supra.*

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misrepresentation to be relied on, in defense of an action of assumpsit for the price of the article sold. To the general duty and liability of medical practitioners as laid down by judges and commentators: *Chitty on Con.*, 553, and note 1, referring to 9 *Conn., Rep.* 209 and 3 *Watts* 355. *Chitty* in the page just referred to, says, "And if the patient be rather injured than benefited in his health in consequence of any gross unskillfulness or carelessness on the part of his medical attendant, no action for fees can be maintained." We refer also to the case of *Montrion vs Jeffreys, R. & M.*, 317, and 2d *C. & P.* 113, S. 6, in which it was decided to be a good defense to an action on an attorney's bill, that the costs were incurred through inadvertency and want of proper caution on the part of the attorney. *Ch. on Cont.*, 559, and to the case of *Huntley vs Bulwer*, in which, on grounds substantially similar, it was held that the attorney was not entitled to recover for his services: *Chity on Cont.*, 561.

Wherefore the judgment is reversed, and the cause remanded for a new trial in conformity with the principles of this opinion.

Davis for plaintiff; *Cox and Reed* for defendant.

Harrison vs Hord.**EJECTMENT.****APPEAL FROM THE MERCER CIRCUIT.****Case 92.***Infants' real estate. Decrees. Purchasers. Notice to quit.**January 1.*

JUDGE HISE delivered the opinion of the Court.

Wm. HORD, the defendant in the action in the lower Court, claims title to a tract of land by virtue of his purchase thereof at a Commissioner's sale, made on the 20th of November, 1829, in pursuance of a decree rendered on the 9th of October, 1829, upon the joint petition of the adult heirs of Indiana Robinson, deceased, and the guardians of her infant heirs, for the sale of a tract of land descended to them. Hord, after his purchase, received a deed from the commissioner, dated the 6th of July, 1831, and the commissioner reported his sale and deed to Hord, on the 9th of July, 1831, when the Court approved the sale and conveyance as made, and ordered the report and deed to be recorded.

Case stated and judgment of the Circuit Court.

Hord, after his purchase, took possession of the land, and has so continued in possession thereof in person or by his tenants from 1829, until the institution of this suit, in April, 1848, a period of about nineteen years.

Wm. B. Harrison as the guardian of his then infant son, Wm. B. Harrison, jr., joined in the petition for the sale of the land, to 2 9ths of which, the infant was entitled by descent from Indiana Robinson.

This party, Wm. B. Harrison, after he had arrived to the age of 29 years, as lessor of the plaintiff, instituted this suit in ejectment against Hord's tenant, to recover 2-9ths of the land, the whole of which had been sold and conveyed to Hord as above stated.

The lessor of the plaintiff, Harrison, contends that the decree and subsequent proceedings under it are void, and that his right and title to his share of 2-9ths of the land were not thereby divested.

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Hord relies for defense upon the title acquired as above stated.

The facts as agreed by the parties in writing, and as shown by the record of the proceedings in the suit, by petition for the sale of the land descended from Indiana Robinson, above referred to, and the law arising thereupon, were all submitted to the Court for adjudication without the intervention of a jury, and a judgment was rendered in favor of Hord, the defendant. Harrison has appealed to this Court, and asks a reversal of the judgment, and assigns for error, that the decree commissioner's sale, and deed, under which defendant claims to have obtained the plaintiff's title, are all null and void, because,

Grounds relied
upon for rever-
sal.

1st. There was no such bond executed by any guardian, as the statute requires, either before or after the sale was ordered and decreed by the Court.

2d. That Wm. B. Harrison, the father of the plaintiff, as his guardian, filed the petition in *his own name*, and not in the name of the infant, (the present plaintiff,) and that having died on the 27th of December, 1829, before the time when the commissioner executed the deed to Hord, and before the sale and conveyance was reported by him, and approved and confirmed by the Court, that in consequence, the suit abated, and as the plaintiff was not then a party himself, and as his father who had petitioned for him as his guardian, was dead, there was no case in Court; and that hence all the proceedings in said suit under which defendant attempts to establish his title to the land in contest, are absolutely null and void.

As a general rule a purchase at a decretal sale made by a Court of competent jurisdiction is valid until reversed unless the decree be void: (4 Dana 438, 7 Id. 483, 7 B. Mon. 62 & Id. 106.)

It may be well to remark that as the defendant holds by purchase under a judicial or decretal sale, that as a general rule, no irregularity or error, unless it be of such character as would make the decree *absolutely void* can defeat the right thus acquired by the purchaser. If the decree be not void, but erroneous merely, and reversible, a fair sale of land made by an officer of the Court, by authority thereof, will be valid, and a title

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thus acquired will not be disturbed even though the decree itself should be reversed. The cases of *Bustard vs Gates and wife*, (4 Dana, 438;) *Singleton vs Cogar*, (7 Dana, 483,) *Lampton vs Usher's heirs*, (7 B. Monroe, 62,) and *Benningfield, &c., vs Reed, &c.*, (8. B Monroe 104,) furnish ample authority to sustain the position assumed.

If the bond required by the statute which authorizes the sale of infants' real estate (2d Statute Law, 806,) should be defective in form or in substance, or if no such bond shall have been given at all, the jurisdiction of the Court is not on that account defeated, and a decree rendered directing the sale of the infants' land would on that account be merely erroneous, but not void, and even its reversal for such error would not generally deprive the purchaser of his right to the land, and if unreversed it is binding and effective between the parties, and cannot be collaterally questioned in another suit between the infants and the purchaser of the land, or those holding under him, so as to overreach in that way, the title acquired by purchase at a public judicial sale. The decree directing the sale of the land in contest in this suit, if admitted to be irregular and erroneous for want of a sufficient bond, is not void, and has not been reversed, and is now irreversible; an appeal or writ of error is barred by lapse of time. The decree was rendered in 1829, and the plaintiff, as shown by the agreed case, was 29 years old when the suit was instituted. If the bond in this case be defective, however, for the reasons assigned, yet where it is attempted to impeach this unreversed decree, collaterally, in the suit under consideration, to recover back the land purchased under it by the defendant, at a fair, open, public sale, and as presumed, at a fair price, such defects in the bond may be properly considered to have been waived and cured because the fact is agreed that the whole amount of the purchase money for the land due to the plaintiff was paid by the defendant to the commissioners, who paid it over to

A sale of infants' real estate is not void though the bond required by the statute: (2 Stat. Law 806,) should be defective in form or in substance.

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the plaintiff's guardian, from whom he, the plaintiff, received the money with all interest accrued thereon, after he arrived at 21 years of age. A defective bond or the absence of any bond at all, has not operated to the prejudice of the plaintiff in the least. He has received the whole amount due him, voluntarily, at mature age, and now appears in this case in the unenviable attitude of claiming the land of a *bona fide* purchaser thereof, for a fair price, whilst he has in his pocket the price in money paid for it, and fails to refund or offer to refund it. It is not deemed necessary therefore, to decide whether the bond in question is defective in form or substance, because,

1st. If it was, the decree rendered would not on that account be *void*, or defendant's right destroyed.

2d. Because if the decree had been erroneous and reversible on that account, the error is cured or unavailable at least, now, as the prosecution of an appeal or writ of error has been barred by lapse of time, and as the plaintiff has received from his guardian the purchase money due to him, and he has suffered no loss for want of a sufficient bond.

Where a judicial sale of infants lands had been ordered and made 28 years, and all the purchase money paid and possession held from the sale—held that no irregularity in the sale would be available in an action of ejectment by the heir.

But it is contended that defendant's title fails, that his deed is void, and that all the proceedings had subsequent to the order of sale in the petition case, are absolutely null and void, because the father and guardian of the plaintiff, as complainant in the petition suing in his behalf, died before the commissioner's report of the sale had been returned, or the deed made by him, and before either was approved and confirmed by the Court. In the assignment of error, as also in the argument of the plaintiff's counsel it is overlooked, that the plaintiff's guardian did not die until after the commissioner under the order of the Court, had sold the land to Hord. The commissioner's sale took place on the 20th of November, 1829. The plaintiff's father and guardian died not until the 27th December, 1830. Even then conceding that the subsequent action of the commissioner in the execution of the deed and in ren-

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dering his report, and of the Court in the decree of approval and confirmation of the sale and commissioner's conveyance, was wholly null and void because of the fact that plaintiff's guardian was *then dead*, yet the validity of the *sale* cannot be questioned, because at that time the guardian was not dead, and because further, (were any other reason necessary to be given,) the plaintiff himself has ratified, approved, and confirmed that sale by his own act, in voluntarily accepting the price in money paid for the land, from his subsequent guardian, after he had attained full age. The defendant Hord, has acquired therefore, a clear, just, and equitable right to the land in contest in virtue of said sale, so ratified and confirmed by the plaintiff himself, and which right would be available and enforceable beyond doubt, in a Court of Chancery at the suit of the defendant.

Shortly after the death of the plaintiff's father and guardian, his grandfather, Thos. G. Harrison, was legally appointed his guardian, and entered into bond with ample security as such, and to him was paid the plaintiff's proportion (2-9ths,) of the purchase money, for his interest in the land, by the commissioner, to whom, Hord, the defendant, had paid the whole amount bid for the entire tract of land. The sale being valid, and a clear right having thus been acquired by the defendant to the land in contest, and the plaintiff having received the whole of the purchase money, the question arises, can the plaintiff lawfully eject the defendant from the land, and should the Court have rendered a judgment in his favor in the pending action of ejectment? If so, then it must not only be determined that the commissioner's conveyance, as approved by the Court, and the order confirming the report and sale, were extra judicial and absolutely void; but also that the defendant has no legal right to withhold the possession of 2-9ths of the land from the plaintiff, notwithstanding the validity of the commissioner's sale; and although that sale has been sanctioned and ratified by

A decree directing the sale of land and a sale under that decree, nor a decree determining a right to the land and directing a conveyance, if they be not executed by a conveyance made will have the effect to pass the legal title: (3 Marsh. 221.)
Feuntleroy's A's vs Henderson, part.

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the plaintiff, as may be implied from the fact that he has received from the guardian the whole of his share of the purchase money. It must be admitted that the decree ordering the sale, and the sale and purchase under it, could not *alone* and of themselves invest the defendant with the *legal title* to the land. He could only thereby acquire a right to have the legal title conferred upon him, which, though wrongfully, is still retained and held by the plaintiff; neither a decree directing the sale of land, though the land be sold under it, nor a decree determining the right to land and ordering it to be conveyed and surrendered, if they be not executed, and conveyances be not made, will have the effect to pass the legal title as adjudged in the case of *3 Marshall, 221*.

It must be further conceded that the decree of the Court confirming the commissioner's report and deed, rendered subsequent to the death of the plaintiff's guardian, as well as the deed itself, are nullities, and void so far as plaintiff is concerned, because there was then, as to him, he being no party, no case legally pending before the Court, to authorize its action. Nevertheless it does not follow that the character of the defendant's possession is such as that the plaintiff, without at least reasonable notice served upon the defendant to quit, or requiring that possession to be surrendered, can maintain an action of ejectment against him. The defendant is not a wrong doer. He must be regarded in virtue of his valid purchase of the land, and in consequence of the subsequent voluntary acceptance by the plaintiff of the purchase money, as in possession of the land with the implied sanction and consent of the plaintiff.

Ejectment cannot be maintained against a purchaser under a decretal sale which has not been perfected by a conveyance, without notice to quit.

It has been held, and cannot be questioned, but that a tenant for a term of years or a tenant from year to year, may maintain an action of trespass against his landlord if he enters upon the premises before the term expires, in the one case, or before due notice to quit in the other, and the tenant can rely upon his tenancy in

his replication to his landlord's plea of *liberum tenementum*, and thus defeat that defense and protect his rightful possession.

It has also been held, and the doctrine has been approved by this Court, that a party let into possession of land under a parol lease for more than one year, or under a parol purchase thereof from the owner, (though both such lease and purchase are within the statute of frauds, and therefore not enforceable in law or equity,) can maintain the action of trespass, 2 C. F., against the lessor or vendor for entering upon his possession without having given a previous six month's notice, or reasonable notice at least, to the parol tenant or purchaser to surrender the possession; and such lease and parol purchase would be an available replication to lessor's or vendor's plea of *liberum tenementum*, and obviously, because the entry of the landlord or vendor in such cases without notice to quit, would be tortuous and wrongful. Though the legal title is held by them their legal right of entry is suspended until the requisite demand and notice should be given: See the case of *Hope vs Cason*, (7 B. Monroe, 546.) This Court in the opinion pronounced in that case, use the following language:

"If an executory purchaser who was let into possession without title at all available at law, is a rightful possessor, and cannot be sued as a wrong doer without demand or notice, so also does it seem right and proper that a parol purchaser who is let into possession under his purchase, should be treated as a rightful possessor, and not as a wrong doer. And we think that no action will lie against him until he has reasonable notice to quit. Until he has been advised of the disavowal of the contract on the part of the vendor he is no wrong doer in morality or law." And again: "We can perceive no good reason why a person entering under a parol purchase should not be permitted to hold, at least with all the rights and privileges of a ten-

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Landlord may
not enter upon
his tenants in
certain cases: (3
B. Mon. 646.)

A purchaser by
parol let into
possession can-
not be ejected
without 6
months notice to
quit: (3 B. Mon.
46, 9 John. 330,
10 Id. 335, 5 B.
Mon. 453, 7 J.
J. M. 319.)

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ant from year to year, and consequently be entitled to the same notice to quit."

The doctrine is that a party let into possession by a parol contract for the lease or purchase of land, or for the possession merely, he having paid the consideration and complied with the terms of the contract, such party holding possession under the agreement, is entitled to notice to quit before such suit is brought, or in other words, that he cannot be ejected by suit until after a disaffirmance of the agreement and notice to quit. See *Jackson vs Rowan*, (9 *Johns. Rep.*, 330,) and *Jackson vs Neven*, (10 *Johns. Rep.*, 335.)

It has been held by this Court in the cases of *Sanders vs Beauchamp*, (8 *B. Monroe*, 493,) and in the case of *Harle vs McCoy*, (7 *J. J. Marshall*, 319,) that a vendee in possession under an executory contract of purchase, cannot be evicted at law by his vendor, although the vendee may have failed to pay the purchase money, without a previous demand of possession and reasonable notice to quit the premises, given prior to the date of the demise as laid, or unless the vendee has himself by his own act, made his rightful possession tortuous. This doctrine is approved and sanctioned by numerous decisions of the Courts in England, and of some, if not all, of the States of this Union. See the authorities cited in the opinion delivered in the case above referred to, in 7 *J. J. Marshall*.

In the case of *Denis and others vs Warder*, (3 *B. Monroe*, 175,) it is held that a party let into possession of land under a sale and conveyance from an executor who had no authority to sell and convey, and who had no title to the land, and consequently passed none either legal or equitable, to the vendee, yet because his part of the purchase money had been paid to one of the heirs who had title with the co-heirs to the land, and he had received his portion of it from the vendee, and thus tacitly and constructively assented to his purchase and possession of the premises, such heir could not evict the vendee in an action of ejectment

from his part of the land, without a previous notice of his intention to avoid the contract and make reclamation, or a demand of possession, with reasonable notice to quit. Now the possession of the defendant in the case under consideration, acquired by a valid judicial sale under an unreversed and irreversible decree, and held by the implied sanction and consent of the plaintiff, as distinctly indicated by his reception of the purchase money due him for the land, is certainly as rightful as that of a yearly tenant or purchaser by a parol or written executory contract, and therefore this action of ejectment cannot be maintained by the plaintiff against the defendant Hord, because he had not, before the date of the demise laid, or at any time before the service of the declaration and notice, made any demand of possession, or given the requisite notice to quit.—And therefore the possession of the land by the defendant was rightful and not tortuous when the suit was brought. The Circuit Court properly, upon the facts agreed and case submitted, gave judgment for the defendant, which is affirmed.

McKee and Burton for appellant ; *Harlan and J. D. Hardin* for appellee.

**SAMUEL AND
JOHNSON
vs
ELLIS, &c.**

Samuel and Johnson vs Ellis, &c.

ERROR TO THE SCOTT CIRCUIT.

Trustees. Trust Estates.

JUDGE CRENSHAW delivered the opinion of the Court.

WILLIAM ELLIS, in the 10th clause of his will, makes the following provision: "It is my will and desire that the farm on which I now live be sold, and all the

CHANCERY.

Case 92.

January 6.

Case stated and
decree of the
Circuit Court.

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residue of my estate which is not named in this will, and the proceeds to be equally divided amongst all my children, except my son, Ottoway's, and my daughter, Nancy's part—their portion shall remain in the hands of my executors to be disposed of as they may think best for them and their heirs."

It appears that a sale of the property directed by the will to be sold was made, and that Spencer C. Graves, one of the executors, has in his hands, as the portion of Ottoway Ellis, the sum of \$650.

The complainants, having recovered a judgment against Ottoway, sued out execution thereon, which was returned *nulla bona*. They then filed this bill to subject to the satisfaction of their demand the interest of Ottoway, derived from his father under the foregoing clause of his will, and which is in the hands of said Graves as executor.

The Circuit Court dismissed the bill, and, in this, it is complained that the Court erred.

The only question presented for our consideration, is, whether the fund in the hands of Graves as trustee can be appropriated by the chancellor for the payment of the demand of the complainants against Ottoway Ellis. Ottoway does not resist the application of so much of the fund by the chancellor, as may be necessary to extinguish the claim set up against him. But the trustee opposes the relief sought, and insists that, by the direction of William Ellis in his will, it is his right and duty to hold the fund in his hands, and pay out the interest thereon for the support of Ottoway Ellis and his family.

If it was the intention of the testator, as it may have been, and probably was, to place the portion which he bequeathed to Ottoway in the hands of trustees, in order to secure it from liability for his debts, contracted by himself, and to prevent its being squandered and wasted by a prodigal son, he has not been successful in devising a mode by which to effectuate that intention. A testator cannot, nor can any one, according to our

A testator devised his property to be sold and proceeds divided etc., and the part coming to his son to remain in the hands of his executor to be disposed of by him as he may deem

laws, vest property or funds in trustees for the use of another, without subjecting it to the debts of the *cestui que trust*. By so doing, if the thing vested in the trustees be property, it is liable for the debts of him for whose use it is held, by virtue of the 13th sec., of an act of 1796, (1st Stat. Laws, 443,) and if the thing, so vested, be money, it is, in like manner, liable on a return of *nulla bona* upon an execution on a judgment, to the debts of the equitable proprietor, by virtue of the 6th sec., of an act of 1821, (1st Stat. Laws, 302).—See *Pope's Exec'rs vs Elliott & Co.* (8 B. Monroe, 62.)

In the case of *Eastland vs Jordan*, (3 Bibb, 186,) it appears that “a negro boy was transferred to Jordan, in trust, that the proceeds of his hire should be applied to the maintenance of Goodrich Lightfoot, during his life.” And, although by the terms of the deed of trust, no express use was given to Lightfoot in the boy himself, but only a declaration made, that the “proceeds of his hire” should be applied to the maintenance of Lightfoot, yet, the Court seems to have regarded the boy himself as held by the trustee for the use and benefit of Lightfoot, and decided that he was liable to be taken and sold under execution for the debts of the *cestui que use*, by virtue of the act of 1796.

In the case of *Cosby, &c. vs Ferguson*, (3 J. J. Marshall, 264,) the facts appear to be, that Lytle executed to Thomas Prather in trust for Cosby and his family, his notes for \$30,000; and Cosby made a deed of trust to Prather and others, transferring these notes for \$30,000 to them, in trust, among other things, for the benefit of himself and family—the interest to be appropriated to the maintenance and use of his family and himself during their lives.

Ferguson having obtained a judgment against Cosby, and a return of *nulla bona*, upon an execution which issued thereon having been made, filed his bill in chancery to subject the trust estate, or the interest of Cosby therein, to the satisfaction of his judgment.

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best for the son
and his heirs—
Held that this
fund was subject
to the payment
of the debts of
the son by the
chancellor. (1
Stat. Law, 302.)

A slave conveyed to one in trust the proceeds of his hire to be applied to the maintenance of another during his life: Held that the interest of the *cestui que trust* was liable to sale under execution: (3 Bibb 186,) See *Cosby &c., vs Ferguson* 3 J. J. Mar. 264 where the chancellor subjected the property of the trust estate: *Pope's Executors Elliot & Co.*, (8 B. M. 56.)

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In the former of these two cases, the property itself was made subject to creditors, and not its profits; and, in the latter case, (it not being necessary, as the Court say, to determine the extent of Cosby's interest,) the annual value of his interest was subjected to the payment of the demand set up against him.

The case of *Pope's Ex'ors vs Elliott & Co.*, (8 Ben. Monroe 56,) is in harmony with these two cases. Elliott & Co., filed their bill in chancery to reach what they alleged to be a life estate of great value, which Robert Pope had lately received under his father's will. It turned out that William Pope, the father of Robert, after making some specific devises, gave all the residue of his estate to his executors to be disposed of in a manner particularly directed in his will. By the sixth clause of his will, the testator directed his executors, or the survivor of them, to place at interest—the interest to be paid semi-annually—a sum sufficient to produce three hundred dollars per annum, which interest they were to appropriate to the support of his son, Robert, so long as he should live; and this sum of three hundred dollars per annum was to be appropriated in instalments of \$25 per month for his support.—The Court say that, “such a devise or bequest, is obviously different from a devise of property or money in trust, for the use and benefit of an individual, and from a devise of specific property in trust, to apply the proceeds or profits to his support. These devises give a direct interest in some specific subject, or in a particular sum of money. The direction, that the executors, having a large estate of the testator, shall, among other things, support a particular individual out of the means in their hands, gives to the beneficiary no such interest.” And in this case the Court subjected to the claim of Elliott & Co., the accumulations of interest in the hands of the trustee for the maintenance of Robert Pope beyond what had been necessary for his support.

In the case under consideration, the testator gave his son, Ottoway, a direct interest in the thing bequeathed. He directed, that the farm on which he lived, and all the residue of his estate which had not been previously mentioned in his will, should be sold, and the proceeds equally divided among his children—"the portion of his son, Ottoway, and of his daughter, Nancy, to remain in the hands of his executors to be disposed of as they might think best for them and their heirs." Here is an unequivocal declaration that the distributive share of Ottoway was to be *his*—to remain, it is true, in the hands of trustees to be disposed of as they might think best for Ottoway and his heirs—but still, the fund is, equitably, the fund of Ottoway.

The fact that the executors have the right conferred upon them by the terms of the will, to dispose of the fund as they might think best for Ottoway and his heirs does not impair the rights of creditors in regard to it. The only question is, has Ottoway Ellis an equitable right to the fund? Is it in equity *his*? If so, it is subject to the claims of his creditors, by virtue of our statutes.

We consider the true principle under our statutes to be, that, where by a deed of trust or other instrument, a beneficial interest in the property or fund, or, in its issues or profits, is created in terms or by implication, for the *cestui que trust*, the property, or fund, or its profit, is liable to the demands of creditors.

The discretion which is given to the executors by the terms of this will, amounts to no more than what results by implication, in all cases of trusts for the use and benefit of third persons. The discretion is properly and prudently to be exercised by the trustees in this, and all other cases for the use of the beneficiaries, else the chancellor will compel them to do so, and even remove them, if necessary, to secure the just application, and proper management, of the trust property or fund.

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Where by a deed of trust or other instrument, a beneficial interest in property or a fund is given, or in its issues and profits, is created, in terms or by implication, for *cestui que trust*, the property or fund is liable to the demands of creditors.

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It results that the Court below erred in dismissing the bill. Wherefore the decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Duvall for plaintiffs; *Kinkead & Breckinridge* for defendants.

TROVER.

Williams, &c. vs Herndon.

Case 93.

APPEAL FROM THE ANDERSON CIRCUIT.

Sheriff's return. Trover. Evidence.

January 7.

JUDGE MARSHALL delivered the opinion of the Court.

A sheriff by levying an execution upon personal property, acquires such an interest as authorizes him to maintain trover for taking it out of his possession, or where he may have left it in the defendant's possession, under his verbal promise to deliver it on request.

THIS was an action of trover brought by Herndon to recover damages for removing and keeping out of his reach, property on which he had levied an execution against one of the defendants. The first count in the declaration is in the common form of a count in trover. The second states the facts, specifically showing that the plaintiff was possessed of the goods as sheriff. There is no misjoinder of counts or of rights of action, as the counsel seem to suppose. The plaintiff claims no other possession but as sheriff. But his right of action is in his personal and not in his official character. And his character and acts as sheriff set forth in the second count, are proper to sustain a recovery under the first. The same cause of action is specifically set forth. The demurrer and the motion in arrest of judgment, were, therefore, properly overruled.

There is no doubt that a levy upon personal property gives to the sheriff such a possession as enables

him to maintain trover for its conversion while in his possession. Nor do we doubt that if he has made a proper levy, but permits the property to remain with the defendant in the execution, or any other, on a verbal undertaking to have it forthcoming on the day of sale, his possession continues so as to entitle him to the action against the bailee or any others who may convert it to their own use, and thus prevent him from subjecting it according to law to the satisfaction of the execution.

The principal question in the case is, whether the execution and the return thereon made by the plaintiff himself, as sheriff, apparently regular, and dated long before the commencement of this action, and stating that he had lived upon the property now in question, were admissible evidence for him to prove such a levy as vested the possession in him. If the return was admissible at all to prove the facts stated in it, it was admissible to prove, and was *prima facie* sufficient to prove that the levy was made according to the duty of the sheriff, and in such manner as to vest the possession in him. And as there is no other evidence tending to show either that there was no levy or the particular manner in which a levy was made, no question arises in the case as to the facts or acts which constitute a legal levy. And the opinions of the Court upon that question, whether right or wrong, were not prejudicial to the defendants. The sheriff returned that he levied on the property, and that there was a jury to try the right, who found the property subject to the execution. There is nothing to contradict any part of the return. But the parol testimony corroborates the statement as to the trial of the right of property, and shows that the parties understood that it had been levied on, and that one of the present defendants having it in his possession or control, and claiming it against the execution, promised, when the trial was over, and the property found subject, that it should be forthcoming on the day fixed for the sale. These facts, in

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The return of a sheriff that he had levied an execution upon property made before any return brought, is competent evidence in an action of trover by the sheriff to recover the possession of the property levied upon.

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addition to the return, authorize the inference that there had been a previous legal levy known to the parties interested. But if the return itself was not admissible as evidence, the case was not properly before the jury. It is to be observed that the plaintiff did not offer to prove by his return that the property had been taken away or withheld by the defendants or any one else, but only that he had levied upon it, there being no mention in the return of what had become of it after the trial of the right. It was the sheriff's duty to make a levy and to enter it on the execution; and if this official statement of an official act which it was his duty to perform and to certify, as he has done, is not to be *prima facie* evidence for him, it would be necessary for him to have and to keep a witness to verify his official acts and statements. We are of opinion that the law does not impose this burthen upon an officer, the nature of whose duties are so multifarious and so hazardous. But that in this, as in other cases, it gives verity to his official statements of his official acts required to be done and certified, so far as to throw the burthen of disproving them upon those who are interested in so doing. It will not assume that in the regular and timely official statement of his official acts, he is making evidence for himself, but rather that he is acting in the discharge of his official duty, and is therefore entitled like every other member of the community to the benefit of the evidence which he has thus furnished in his official character.

In the case of *Brown, &c. vs Commonwealth for Price*, (6 *Monroe*, 621,) which was an action for an escape, the Court decided that the plaintiff having read so much of the sheriff's return as showed the capture and escape, the sheriff had a right to read the addition which stated a fresh pursuit, although this addition had been made by way of amendment with the leave of the Court, after the original return. And in other cases, as in *First vs Miller*, (4 *Bibb*, 311,) where a part of the return has been held incompetent to prove the fact

stated in favor of the sheriff, it was evidently upon the ground that the sheriff was not required or authorized by law to return the particular fact; and not upon the ground that his return regularly made, could not be used by him as evidence of a fact which he was required to certify.

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We are of opinion, therefore, that the return as read in this case, was admissible as *prima facie* evidence between these parties, and that it proved sufficiently a lawful levy on the property in controversy. The questions of fact as to the eloinment of the goods by the defendants jointly or severally, was properly left to the jury, and their verdict on that point was authorized by the evidence. The mortgage of which S. D. Williams claimed the benefit, did not justify his removing or withholding the property which he had promised to have forthcoming. Nor did it furnish ground for diminishing the recovery on account of the sum due him by the mortgage, as there was other property conveyed in the mortgage greatly more than sufficient to discharge his demand, and wholly unaccounted for. Nor was the verdict for a greater sum than was sufficient to cover the damages sustained by the plaintiff by the conversion of the property, whereby he was rendered responsible for the debt, interest, and costs, and deprived of his commissions on the sale.

There is, therefore, no ground in the evidence or the instructions for disturbing the verdict. And as the evidence offered after the instructions had been given, was perfectly within the power and knowledge of the defendants during the whole course of the trial, and when sifted proves scarcely any thing more than they had before proved, the refusal to allow it to be introduced was not an abuse of discretion which requires this Court to direct a new trial.

Wherefore the judgment is affirmed.

J. D. Hardin, Penny, and Harlan, for appellants;
Herndon and Draffin, for appellee.

CHANCERY.

Armitage vs Wickliffe.

Case 94.

ERROR TO THE BATH CIRCUIT.

January 9.

Equity jurisdiction. Mortgages. Releases. Practice in Chancery.

Case stated. CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

IN May, 1821, John T. Mason executed a deed of mortgage to Thomas E. Boswell, conveying to him a tract of land in the county of Bath, lying on Beaver creek, containing one thousand acres, on which a furnace had been erected, being a tract of land patented in the name of the heirs of Thomas Swearingen, dec'd., to secure the payment to the mortgagee, of a debt of upwards of ten thousand dollars due to him, by the mortgagor and James, and Richard M. Johnson.

On the 5th of June 1823, Mason executed another mortgage to the President, Directors, and Company of the Bank of Kentucky, on the same tract of land, and on several other parcels of land without any specific description, but referring merely to the several deeds and title papers of the mortgagor in general terms, to secure a debt to the Bank, of seven thousand two hundred and twenty-five dollars. And in May, 1824, he executed to the same parties another mortgage on various other tracts of land in the county of Bath, to secure the payment of a debt of five thousand six hundred and ninety-four dollars that he owed to the Bank, and for which, William T. Barry, Thomas Fletcher, and others, were bound as his sureties.

A suit was instituted in 1827, to foreclose the mortgage to Boswell, and to have the one thousand acres of land sold for the purpose of paying the debt mentioned in the mortgage; and in the year 1831, under a decree rendered in the suit, the land was sold and purchased

by William Johnson, to whom it was conveyed by a commissioner appointed by the Court, and it was afterwards conveyed by the purchaser to the President and Directors of the Bank of Kentucky.

The President, Directors, &c., of the Bank of Kentucky brought a suit in chancery in the Franklin Circuit Court for the purpose of procuring a sale of the lands included in the mortgage, executed to them by Mason, in 1824. The suit was instituted in 1827, and a decree to sell the mortgaged property was rendered in 1829, but no sale has ever been made. In April, 1837, the same parties instituted a suit in the Bath Circuit Court to foreclose the same mortgage, but no decree was ever rendered in the suit, and in 1844 an order was made directing the papers to be filed away, and no steps have since that time been taken in the cause, by any of the parties. It does not appear that any proceedings have ever been had upon the mortgage executed to the Bank in 1823.

On the 23d day of August, 1836, the Bank of Kentucky, by her agent H. Blanton, executed to the heirs of Robert Scobee, dec'd., a deed conveying to them "certain pieces or parcels of land situate lying and being in the county of Bath, which was conveyed to the parties of the first part by John T. Mason and others, lying on Beaver creek and its waters, and known as a part of the land attached to the Beaver Iron-works, and conveyed as aforesaid, except two tracts at the mouth of Beaver creek, one in the name of Lee, and the other in the name of Smith, which is excepted in this sale."

Robert Wickliffe, in the year 1827, attained a judgment by confession, against John T. Mason in the Jesamine Circuit Court for the sum of four thousand five hundred and seventeen dollars and seventy cents, and in the year 1839, he had an execution issued on the judgment and directed to the sheriff of Bath county, which execution was levied by the sheriff on twenty-seven tracts of land in the county of Bath, being the

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same land contained in the mortgage of 1824 executed by Mason to the Bank of Kentucky, and Mason's equity of redemption therein was sold, and purchased by the plaintiff in the execution, at the price of about seven hundred and thirty-three dollars. Wickliffe subsequently had another execution on the same judgment issued to the county of Bath, which was levied by the sheriff of that county on thirty-four tracts of land, all of which were sold by him as the property of Mason, and purchased by Wickliffe at the price of one hundred and fifty-five dollars, for all of which lands he obtained a conveyance from the sheriff. The lands sold under the latter execution, were the same lands in which Mason's equity of redemption had been previously sold under the first execution, together with several additional tracts of land not embraced in that sale. But neither sale included the tract of one thousand acres on Beaver creek on which a furnace had been erected, and which had been sold under the mortgage to Boswell, and purchased by William Johnson and conveyed by him to the Bank of Kentucky.

This suit in chancery was instituted by Robert Wickliffe in the year 1841, against the President, Directors, and company of the Bank of Kentucky, Harrison Blanton as their agent, John T. Mason, the heirs of Robert Scobee, dec'd., and James Armitage, who claimed under Scobee's heirs. In his original bill he claimed the land contained in the deed made to him by the sheriff of Bath county, under his two purchases, and alleged that the second sale and purchase was made in consequence of information obtained by him after the sale of the equity of redemption, that the President, Directors and company of the Bank of Kentucky had sometime previously by H. Blanton, their authorized agent, executed to John T. Mason a release of the debts secured by the mortgages executed by him to them, whereby the land was discharged from the incumbrance of the mortgages, and was liable to execution. He alleged that Scobee's heirs, and Armitage claiming un-

der them, had obtained possession of part of the land purchased by him, and were claiming it and also other portions of the land that he had purchased, and prayed that the defendants might be compelled to release to him any title they had to said lands, and that his right and title thereto might be made perfect and quieted.

By an amended bill he alleged the execution of the release to Mason, and set up and relied upon it. He also alleged that Scobee had in his lifetime purchased from the agent of the Bank five hundred acres and no more, of the land upon which the furnace was located, and that his heirs after his death had by fraud, procured the execution of the deed to them, for more land than had been purchased by their ancestor. He admitted Christie Scobee, one of the heirs, had by deeds of conveyance from the other heirs, obtained the title to the land conveyed to the heirs by Blanton as agent for the Bank, as stated by Christie Scobee in his answer, and agreed that such should be regarded as the true state of fact in the preparation and trial of the suit. And it was subsequently agreed upon the record by the parties that Christie Scobee was invested with the title to all the land in contest, which his ancestor Robert Scobee had at the time of his death.

Mason answered, and set up and relied upon the release executed to him by Blanton as agent for the Bank, which release was executed in June 1837. Christie Scobee in his answers to the original and amended bill, denied the alleged fraud in obtaining the deed from the agent of the Bank, controverted the complainant's right to any of the lands, and stated that he knew nothing of the release set up, or the manner of its procurement, but that its date was subsequent to the execution of the deed to Scobee's heirs, and that therefore the Bank had parted with all her interest in the lands in controversy, and had nothing to release at the time the deed of release was executed. Harrison Blanton answered as the agent of the Bank of Kentucky, and alleged that the release to Mason was intended, and so understood.

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by the parties, to be, merely a personal discharge from all liability for the debts, after the mortgaged property was exhausted, which was to be retained by the Bank as its own, and that such was the legal effect of the writing denominated a release. But he did not allege either fraud or mistake in its execution.

The release referred to is in the following language, viz:

"Know all men by these presents, that I, Harrison Blanton, agent for the President, Directors, and company of the Bank of Kentucky, hath for and in consideration of the sum of seven hundred dollars, the receipt whereof is hereby acknowledged, covenanted and agreed, and do by these presents covenant and agree to, and with John T. Mason, that they will hereby give up and surrender all claim and demand against the said Mason and all others, upon the following notes, &c.," enumerating and describing the debts and the balances due thereon, contained in the two mortgages to the Bank.

In 1846, after the defendants had answered, Wickliffe filed another amended bill, in which he alleged that Scobee and those claiming under him; had never been in the actual possession of any part of the land, except five hundred acres around the furnace; and that he was himself in the possession of the balance of the lands; but as the defendants pretended to have a claim upon it, they thereby disparaged his title and obstructed him in the full enjoyment of his property. He also alleged that the defendants all knew the signature of Blanton, and the seal of the corporation, and he therefore called on them and each of them, to deny or admit that the release to Mason was the act and deed of the Bank by their agent, the defendant Blanton. This amended bill was not answered by either of the defendants.

It appears from the testimony, that Scobee purchased from the agent of the Bank, the land around the furnace in the Swearingen survey, for the sum of five

hundred dollars. That the agent who made the sale, executed a bond to Scobee, at which time it was suggested by the latter, that he wished to keep stock in the range on Beaver, and for the purpose of preventing other persons from using that range, he would like the bond to be drawn in general terms, which the agent proved was done for that and no other purpose, as Scobee had purchased no land, but the land owned by the Bank in the Swearingen claim, supposed by the agent, as he deposed, to have been five hundred acres only. The sale to Scobee was made by Sudduth, who was the agent of the Bank at that time, and the deed was executed by Blanton, as he proved, in pursuance of the bond previously executed by Sudduth. Blanton also testified that when he executed the release to Mason, he had no intention that it should operate as a release of the property mortgaged, and he then believed that the Bank had a full and clear title to all the lands.

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The Court below rendered a decree cancelling the deed to Scobee, for any land, except the Swearingen survey of one thousand acres around the furnace, and enjoining the defendants from further disturbing Wickliffe's possession and title to the lands in contest outside of the Swearingen claim. To that decree Armitage has prosecuted a writ of error.

The decree of
the Circuit
Court.

The first objection made to the decree is, that the proper parties were not before the Court. No process was served upon the President and Directors of the Bank of Kentucky, nor was process served upon all the heirs of Robert Scobee, dec'd. On the other side, it is contended that this objection is not available, because as to the Bank, Blanton who appeared and answered, was, by an act of the Legislature, invested with all the powers that had previously belonged to the President and Directors, and had complete control over all its business; and the agreement of the parties that Christie Scobee, was invested with all the title that his ancestor had, dispensed with the necessity of making the other heirs parties. Whether these reasons are or

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not sufficient to obviate the necessity of having had the process executed upon all the defendants; we do not deem it necessary to determine, inasmuch as this objection is not embraced by either of the assignments of error.

Wickliffe exhibited patents for the various tracts of land conveyed to him by the sheriff, but failed, as to some of the tracts, to adduce a regular derivation of title from the patentees to John T. Mason; it is consequently contended that the complainant should have made the holders of the legal title parties to his suit. But as he sought no relief against them, it was unnecessary to make them parties. He could only maintain his bill, for the purpose of establishing his claim, and quieting his title and possession, to that part of the land to which he had the legal title, and of which he was actually possessed. The decree does not affect the interest or right of those who were not parties to the suit, and the want of proper or necessary parties, as before remarked, is an objection not made by any of the assignments of error. And as all the parties to this controversy except Mason himself, claims under him, he must be regarded so far as they are concerned, as having been invested with the legal title originally, and the rights of the parties depend upon the title which they have respectively derived from him.

One holding the legal title and being in possession may maintain a suit in chancery to quiet his possession under the statute of 1756: (1 Statute Law 254,) or upon general principles of equity.

Another objection made to the decree is, that the complainant did not present a case of which a Court of chancery had jurisdiction. If by his purchases under execution at the sheriff's sales, he acquired nothing but an equity of redemption, he might have applied to a Court of chancery to redeem the mortgaged property; but his original and amended bills were not formed for that purpose, nor do they contain an offer to redeem, nor even a proposition that so much of the property, as is necessary, should be sold to pay the mortgage debts. On the contrary he claims the land as his own absolutely, and the aim and object of the suit was to quiet his title. If he had the possession, and the

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legal title, he had a right to institute his suit against any other person setting up a claim to it or any part of it. The statute of 1796: (1 Vol. Stat. Law 294,) expressly authorizes a suit to be brought in such a case, and we have no doubt, of the right of a person under such circumstances, to maintain a suit in a Court of chancery independently of the statute, upon well established equitable principles. But in the manner in which the suit was brought and conducted, unless the complainant had a right to file a bill of *quia timet*, he has not presented such a case, as authorized a Court of equity to afford him any relief.

The enquiry then arises, did Wickliffe make it appear that he was invested with the possession of, and the legal title to, the land's claimed by him. As he alleged in his last amended bill, that he was in the possession of the lands, and it was not denied, the amended bill not having been answered, the fact must be taken to be, as therein alleged by him. But the question of title, is more important, and must in the next place be considered.

The release executed to Mason, is relied upon, as having reinvested him with the legal title to the lands mortgaged, and consequently as having through the medium of the sheriff's sale and conveyance vested it in Wickliffe as purchaser. The reading of the release upon the trial was objected to upon the ground, that its execution had not been proved, but the objection was overruled, and the release read as evidence. The correctness of this decision of the Court is evident, inasmuch as it was averred in the amended bill heretofore referred to, that the defendants all knew the signature of Blanton, the agent of the bank, and the seal of the corporation, and they were called upon to admit or deny that the release was the act and deed of the Bank by Blanton, its agent. Not having denied it, the Court properly regarded the release as the act of the Bank, and permitted it to be used as evidence against the defendants. Besides, the conveyance to

An exhibit set out in an amended bill, and stated to be known to the defendants to be genuine, and which is not answered will be regarded, at the hearing as genuine.

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A release to a mortgagor of property mortgaged from all further liability or for the debts which the mortgage was intended to secure is a release of the mortgaged property.

Scobee was made by Blanton, and he was recognized by both parties as the agent of the Bank, and the execution of the release was not denied by him, but on the contrary was admitted in his answer, and substantially proved in his deposition, taken by the defendants, and read as evidence upon the trial.

As the release discharged Mason from all further liability for the debts and demands therein specified, its legal effect and operation was to discharge his property also, from all liability for their payment, and as none of the lands had been sold under the mortgages to the Bank, and the proceeds applied to the satisfaction of the debts, no right to sell Mason's property for the payment of debts for which he was not liable, existed after the execution of the release. No fraud or mistake is alleged to have occurred in the execution of the release, which is broad and comprehensive in its import, and contains no reservation of the mortgaged property, or of any other right or claim upon the part of the Bank. The intention or understanding of the agent when he executed it, cannot limit its legal operation. What the agreement of the parties was, does not appear; and therefore it cannot be decided, that the release is not in strict conformity with such agreement. But it only discharged Mason from the balance of the debts and demands then due. So far as the debts had been paid either in lands or in any other manner, the Bank had a right to retain what it had received. The only land however that had been conveyed to the Bank in payment of the debts or any part of them, was the survey of one thousand acres in the name of Swearingen, contained in the deed executed by William Johnson. That tract of land was deeded to the Bank as part of the consideration upon which the sureties of Mason, in the debts named in the mortgage of 1823, were to be discharged from further liability for said debts. The other lands were only held in mortgage to secure the payment of the debts, and when the mortgagor was released from them, the Bank had no

further claim under the mortgages. The fact that a decree for the sale of the lands had been obtained under the mortgage of 1824, did not change the rights of the parties. The object of the sale was to pay the debts due by the mortgagor, and when he was released from them the Bank had no right to sell, but the decree became inoperative, and any attempt to execute it would have been inequitable and unjust.

Did however, the execution of the release, operate in law to transfer the legal title, to the land's, to the mortgagor. Upon the solution of this question, the extent of the right acquired by the complainant, as purchaser, at the second sale made by the sheriff, essentially depends. If the legal title were in Mason at the time of the levy and sale made by the sheriff, it passed to the purchaser by the sheriff's deed. If it were not, the sale was nugatory and unavailing, and no right or title under it, passed to the purchaser.

The doctrine is well settled, that upon the payment of the money secured by the mortgage, the legal title to the land is by operation of law, immediately reinvested in the mortgagor: (1 *Mar.*, *Rep.*, 53.) *Dougherty vs Kerchival*, (1 *J. J. Mar.*, 257,) *Breckinridge heirs vs Ormsby*.

By analogy, a release of the debt, should have the same legal effect. The extinguishment of the debt, whether it be by payment or release, deprives the mortgagee of all right to the property mortgaged, and there seems to be no good reason why the legal title, should not be transferred by operation of law to the mortgagor in one case as well as in the other. Such appears to have been the opinion of this Court, in the case of *Hawkin's heirs vs King*: (2 *Mar.*, 109,) where it is said, that "the assignment of the debt, or forgiving it, will draw the land after it as a conveyance; nay it will do it, though the debt were forgiven by parol, for the right to the land would follow, notwithstanding the statute of frauds."

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If land be mortgaged to secure a debt, and the debt be paid, the legal title reverts in the mortgagor, (1 *Mar.*, 53, 7 *J. J. Mar.*, 257.) By analogy the released of the debt should have the same legal effect: (See *Hawkins' heirs vs King*, 2 *Mar.*, 109.) Such will be the effect though there had been a decree for sale to satisfy the mortgage debt.



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As no change in the rights of the parties was effected by the decree which had been obtained by the bank, to sell the land included in the mortgage executed in 1824, but the land still continued to be merely a security for the payment of the debt, the release of the debt, had the same legal effect and operation upon the title, that it would have had, if no decree for the sale of the property had been rendered.

It follows then from these principles, that the legal title to the lands embraced in the deeds of mortgage to the bank, was in Mason, at the time of the sheriff's sale, and passed to the purchaser, unless they had been conveyed by the bank to Robert Scobee, before the release to Mason was executed; and that conveyance, had the effect to prevent the transfer of the legal title to Mason.

A deed conveying more land by its terms than the grantor had a right to convey, might be effectual only to convey so much as he might lawfully convey.

The deed to Scobee, was executed before the release, and it becomes therefore, necessary to determine what land it embraced, and what title passed to the grantee. The only land owned by the bank, which had been included in any of the deeds of mortgage, was the Swearingen tract of one thousand acres. That, or part of it, was the land sold to Scobee, and was the only land that the bank had the power to sell absolutely. The description of the land conveyed to Scobee, contained in the deed, is indefinite and uncertain. But it is evident from the contents of the deed, and from the testimony upon the subject, that the land sold and intended to be conveyed by the bank to Scobee, was the land that belonged to the bank, and not the land to which the bank had no title, except, that, conferred by the deeds of mortgage. If the deed to Scobee includes any of the land, which the bank did not own at the time, of its execution, but held merely as a security under the deeds of mortgage, it was manifestly included in the deed by mistake, as it is not pretended, that the bank designed to transfer to Scobee, any part of the debt on Mason, and the only effect, that could be given to a conveyance by the mortgagee, of the land

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contained in the mortgage, would be to invest his alienee, with the same right which he had to it, and for that purpose it might be regarded, where such was the intention of the parties, as transferring the debt, at least in equity, as well as the security, to the alienee. But here the debt on Mason, was not transferred or intended to be transferred to Scobee, by the bank, and if the deed embraced any of the land held by the bank in mortgage as a mere security, it was included either by mistake, or in consequence of the manner in which the contract had been drawn, by the agent of the bank at the instance of the purchaser, and by the concealment of that fact at the time the deed was executed, in either case the title to the land, was held by the alienee in trust for the bank, and when the debt was released the title became reinvested in Mason, in the same manner as it would have done, if it had continued in the mortgagees. So that it is not material whether the deed to Scobee, included any of the land which the bank held merely in mortgage or not, as the same legal effect was produced by the execution of the release, whether the title still continued in the bank, or had been conveyed to Scobee.

It results from these views and principles that the decree of the Circuit Court confirming Wickliffe's title to all the land, except the Swearingen claim, to which he does not appear to have any right, is correct.

Wherefore, the decree is affirmed.

Apperson, French, and Peters, for plaintiff; *Wickliffe* for defendant.

CHANCERY.

Cottrell vs Moody, &c.**Case 95.**

APPEAL FROM THE KNOX CIRCUIT.

Equity jurisdiction. Restraining orders.

January 9.

JUDGE MARSHALL delivered the opinion of the Court.

Case stated.

COTTRELL filed his bill against Moody, Haynes, and others alleging in substance, that a flagrant trespass had been committed upon his property by killing, crippling and worrying his cattle, whereby he had sustained damage to the amount of \$1,000, that he had brought on action of trespass against them to recover for the injury, and that bail had been required, and by some of the defendants given. But that Moody, after being arrested, had escaped, and was avoiding recapture—that Moody, and Haynes, were the only defendants who had property, from which his expected judgment could be satisfied, and that they had fraudulently disposed of a part and were fraudulently disposing of the residue of their property for the purpose, and with the effect if successful of defeating the satisfaction of the judgment which he expected to recover against them and others. And he prays restraining orders and attachments against them, and against persons holding their property or indebted to them, so as finally to secure the subjection of their property and means to the satisfaction of the expected judgment. The bill also prays that the defendants may make disclosures as to their own participation and that of others in the alleged trespass. A demurrer to the bill was sustained, and the bill having been dismissed, the complainant appeals to this Court for a reversal of the decree.

In support of the decree it is contended 1st, that the bill does not positively allege that the defendants were guilty of the trespass. 2d, that the defendant

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were not bound to make a discovery which might subject them to a penal prosecution for malicious mischief. And 3d, that the Court of equity has no jurisdiction to grant the relief sought for in aid of the action of trespass.

1. With regard to the first objection it is to be observed (and the observation applies also to the last,) that the bill does not propose to bring into the equitable forum the question whether the defendants were guilty of the alleged trespass, but the complainant has instituted the proper action for the trial of that question in a Court of law, and only invokes the ancillary jurisdiction of the chancellor to prevent the defendants from fraudulently depriving him of the anticipated fruits of that action. If the defendants were to answer denying their guilt in the most positive manner, there would still be no issue triable in equity, and the Court would await the result of the trial at law as furnishing the only proper evidence of guilt or innocence. It seems to follow from this consideration, that the same certainty and particularity is not requisite in a bill of this character as in a bill requiring the chancellor to grant or withhold final relief upon his own ascertainment of facts; and that if the ancillary jurisdiction may be exercised in aid of an action of trespass, it will suffice that the bill invoking it, shall show certainly that the action is brought in good faith, and that complainant verily believes, and has good cause to believe that the defendants or those against whom the provisional relief is sought, were guilty and will be convicted of the trespass alleged. His liability upon his bond, and in an action on the case for damages, if the proceeding be groundless, furnish some guarantee that he is acting in good faith and some ground for confidence in the first instance on the part of the Chancellor. But independently of this view, we are of opinion that the bill does not only express a belief that the defendants are guilty, but states in positive terms that they committed, a part at least of the trespass referred to, and moreover states facts, which if true, would in the absence of countervailing proof make

On a bill filed by a plaintiff to restrain the sale of the defendants property to prevent its liability for damages which the complainant expects to recover for a trespass the chancellor may restrain such sale. It is sufficient to aver the pendency of the suit at law—that defendant are believed by complainant to be guilty, and states that the amount which complainant expects to recover, and his belief that defendant is about fraudulently to dispose of his property to evade the payment of the damages.

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them all guilty of all the trespasses alleged. It states "that the defendants swore that they would kill, and that his stock should be destroyed if he turned it upon the range aforesaid, that in pursuance of said threat said defendants as he verily believes, wantonly and maliciously killed 38 or 40 head of said cattle, worth \$18 per head—that they the defendants shot and crippled 17 more of his cattle, and so run, worried, and abused his entire lot of 139 head, &c." The charge is scarcely mitigated or qualified by the words "as he verily believes," which may apply to "wantonly and maliciously" as describing the motive of the defendants, and not to the statement that they killed the 40 cattle. But those words do not apply to the shooting and crippling, &c., which is positively charged, and is sufficient to constitute a trespass.

2. As to the second objection, it is sufficient to say that however true it may be in fact, the only consequence is, that the defendants were not bound to answer the interrogations which would subject them to prosecutions, but the fact that such interrogatories are contained in a bill seeking relief, is no ground for a demurrer to the whole bill.

3. The question whether the chancellor may interpose in aid of an action of trespass as asked to do in this case, is not free from difficulty. But a party whose property has been seriously injured by a trespass or other tort is as much entitled to recover the damages which he has sustained, as if the injury consisted in the non performance of a contract, the law intends that his remedy in the legal forum for the first shall be as complete and effectual as for the last. The aid of the Chancellor may be as necessary for the effectuation of the legal remedy in the one case as in the other, and upon the same grounds. And as the exercise of the ancillary jurisdiction does not necessarily bring the question of legal liability before the Court of equity, and does not imply or depend upon the power of the Chancellor to ascertain and decree the demand itself,

The jurisdiction of the chancellor to interpose to prevent, and defendant in trespass from disposing of his property and effects to avoid the judgment which may be recovered, is ancillary to that of the Court of law—as that of the chancellor is to preserve the subject of an action at law from removal or sale, until the question of right is settled at law—is not the principle of this case recognized

but only to aid the legal remedy by which it is to be ascertained and adjudged, the fact that the demand arises out of a trespass for which he cannot decree compensation, does not of itself furnish a reason for his non-interference. If the judgment were already obtained, the Chancellor might undoubtedly interpose to subject the defendants property to its satisfaction, where he had interposed obstacles to the legal remedy.

So the Chancellor will interpose to preserve the subject of the action at law as in ejectment or detinue, even before judgment. And in analogy to these instances and to the interposition authorized in cases of contract, we are of opinion that when there is sufficient probability of a judgment being obtained, the Chancellor may and should interpose to prevent the legal remedy from being defeated by fraud.

We think therefore, that the Court of equity had jurisdiction to grant and to maintain the restraining orders and attachments prayed for in this bill until the trial of the action of trespass, and then to discharge them or apply the effects to the satisfaction of the demand, according to the result of that trial.

Wherefore the decree is reversed, and the cause remanded with directions to overrule the demurrer to the bill, and for further proceedings consistent with this opinion.

Woodson for appellant; *Adams and Harrison* for appellees.

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vs
MOODY, &c.
in *Lillard vs*
McGee: (4 Bibb
167, Rep.

12bm504
104 86**ASSUMPSIT.****Rogers vs Wiggs.****Case 96.****APPEAL FROM THE FARNKLIN CIRCUIT.***Vendor and Vendee. Landlord and tenant. Rents.
Assumpsit.**January 9.*

JUDGE CRENSHAW delivered the opinion of the Court.

Case stated and
decree of the
Circuit Court.

ON the 12th day of February, 1848, Wiggs sold to Rogers a tract of land in the county of Franklin, and gave him a title bond. And, on the 24th day of April, 1849, Rogers brought his suit in chancery against Wiggs for a specific execution, if Wiggs could make a good title, and, if not, for a rescision of the contract. At the February term, 1850, of the Franklin Circuit Court, said contract was, by a decree of said Court, rescinded.

In that suit in chancery, Wiggs failed to set up any claim for rents; and, on the 15th day of April, 1851, he instituted this action of assumpsit against Rogers for use and occupation. The general issue was pleaded with leave to either party to give in evidence any special matter. The jury found a special verdict, and the Court, being of opinion that the law was for the plaintiff, gave judgment for him for the amount of rents ascertained by the verdict of the jury.

It is now contended that the Court erred in rendering judgment for the plaintiff; that the judgment ought to have been for the defendant; that the plaintiff ought to have set up his claim for rents in the suit in chancery, brought for a rescision of the contract, and that, not having done so, he is barred from any other proceeding to recover rents.

Where a suit in
chancery is
brought by ven-
dee for a rescis-
ion of the con-

There is no doubt that the plaintiff ought to have set up any claim which he had for rents, in the suit in chancery, where the defendant, if he had any claim for improvements, could have set them off against the

rents, and a complete equitable adjustment of the rents and improvements could have been made. The rents and improvements were an equitable incident to the suit for rescision, peculiarly appropriate to the suit in chancery, and not having been adjusted in that suit, we are of opinion that a Court of law does not afford a remedy to recover either.

An action of assumpsit for use and occupation cannot be maintained, where the relation of landlord and tenant has not subsisted; and not even then, at common law, except upon an express promise, made at the time of the demise. This rule, however, has been relaxed by our Court, so far as to permit a recovery in this action by the landlord against his tenant upon an *implied* assumpsit. But, still, the action cannot be sustained unless the relation of landlord and tenant has existed.

In the cases of *Smith vs Stewart*, (*6th Johnson's Rep.*, 46,) and of *Bancroft vs Wardwell*, (*13th Johnson's Rep.*, 491,) this principle is recognized, and laid down as the law, and it is there decided, that where a man enters as a *purchaser*, no such relation of landlord and tenant exists as will authorize the action of assumpsit for use and occupation. In the case of *Smith vs Stewart*, *supra*, the Court say: "Here the defendant did not enter under such a relation, (that is, as tenant to the plaintiff,) but under a contract for a deed.

And, in the case of *Bancroft vs Wardwell*, *supra*, they say: "If the defendant could be considered as holding at all, under, or by permission of the plaintiffs, it was as a purchaser, and not as a tenant. Such holding is not enough to maintain this action, according to the decision of the Court in the case of *Smith vs Stewart*."

When a man holds and cultivates land as a purchaser, he holds and cultivates it as his own, and not as the land of his vendor, and the law does not imply a promise to pay rent. And, when the Chancellor, upon a rescision of a contract for the sale and purchase of land directs an account to be taken of rents and improve-

ROBERT vs WIEGA.

tract of purchase, if vendor has any claim for rents, it must be set up in that suit, he will not be permitted after the decree of rescision to sue at law for rent accruing during the occupancy of vendee.

Assumpsit for use and occupation does not lie unless the relation of landlord and tenant has existed, and not then except upon express or implied promise made at the time of the demise, or an implied promise.

A vendee entering into possession under his purchase, is not such tenant as is liable in assumpsit for use and occupation: (*See 6 J. & W. Rep.*, 46, 13 *Id.* 49.)

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ments, it is not upon the principle of an implied promise from one of the parties to the other, to pay for rents or improvements, but upon a principle of equity that neither party shall be enriched at the loss of the other, and that the parties should be placed as near as may be in *statu quo*.

The plaintiff failed at the proper time, and in the proper forum, to insist upon his claim for rents. And he has now, in our opinion, applied to a tribunal that cannot, according to settled principles, afford him relief.

Wherefore the judgment is reversed, and the cause remanded, with directions that the judgment be set aside, and that judgment be rendered for the defendant.

Lindsey for appellant; *Cates and Brown* for appellee.

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OR. PETITION

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Case 87.

APPEAL FROM THE HENRY CIRCUIT.

12bm506
f129 271

Evidence. Verdict. Shop Books.

January 12.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

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Case stated.

THIS was an ordinary proceeding by petition, against Brannin and Smith as the surviving partners of Smith & Co.' on a note for \$517 44, executed in the name of the firm, to John P. Foree, and payable on the 8th day of June, 1839.

The defendants answered, and averred that the whole of the debt sued for, except eight or ten dollars, had been paid, and no more of it remained due.

A jury having been sworn to try the issue, returned a verdict in which they found for the plaintiffs, the debt in the petition mentioned, and one cent in damages.

A motion for a new trial, and also in arrest of judgment, having been overruled, the defendants have appealed to this Court.

The propriety of granting or refusing a new trial, depended exclusively upon the correctness of the decision of the Court in excluding from the consideration of the jury, certain proof made by the defendants, in support of the defense contained in their answer.

The testimony thus excluded was as follows: That Thomas Smith, who was a member of the firm at the time the note sued on was executed, but who had since died, acted as clerk for the firm. That the entries in the books of the firm, showed the execution of the note to Foree, and the subsequent payment of the whole amount of it, except ten dollars or thereabouts. These entries were in the hand-writing of Smith, and the books in which they were contained were the regular account books of the firm. The witness who proved these facts, also testified that he had been the acting clerk in the house of Smith & Co., until within a short time before the execution of the note to Foree that after the partner Smith commenced acting as clerk, he was frequently absent from home, and the witness who was still in the store, on such occasions assisted in attending to the business. He also proved that there were other entries in the books, both before and after the entries in relation to this note, evidencing other business transactions between the parties, but not referring to the note sued upon; and that he had, after he ceased to be clerk, examined the books of the firm almost every day, and so far as his knowledge extended they were correctly kept. From the fact that the entries relied upon to show the payment of the debt, were made regularly in the books of the firm, and were in the hand-writing of the said Thomas Smith,

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Entries made in shop books made by disinterested clerks, have in some cases been held to be competent evidence for the shop owners, when the nature of the case is such as to render better evidence unattainable. And in some cases has been extended to entries made by a party himself, though such proof should be made with great caution, and never to prove the payment of any note or money due: (1 *Yeates* 347. 4 *Mues. Rep.* 231.

deceased, he had no doubt the entries were correct and in accordance with the fact. The books and the entries referred to were present, and offered as evidence.

Entries made in shop books, are in some cases held to be admissible as evidence of the sale and delivery of goods therein charged, the entry having been made by a disinterested clerk, in books kept for the purpose, where the nature of the subject is such as not to render better evidence attainable.

This doctrine has, in some cases, been extended to entries made by the party himself, in his own shop books, but such evidence being furnished by the act of the party himself, is received with greater caution.

To render such entries admissible as evidence, the books must appear to contain a register of the daily business of the party, and to have been honestly and fairly kept; and the person who made the entries must swear that the articles charged were actually sold and delivered, that the entries are the original ones, and were made at or about the time of the transactions, and that the sums charged and claimed have not been paid. (1 *Vol. Greenleaf on evidence. Sec 118 and note 1.*)

Evidence of this description is admitted upon the principle of "moral necessity." It is received upon the presumption, that unless it be admitted there will be a total failure of proof, and that injustice will consequently result. It is, however, but secondary evidence, and that of the lowest grade. The principle upon which it is rendered admissible is therefore limited in its operation to that character of dealing, to which the law has *prima facie* ascribed a destitution of the ordinary means of proof, viz; the daily sale and barter of merchandize and other commodities, the performance of services and letting of articles to hire, and probably the payment, from time to time, of money placed on deposit—circumstances so frequent in succession, and generally so trivial in their individual amount, that the procurement of formal proofs cannot be expected, and would not compensate for the time necessary for the purpose.

If the competency of the proof in this case be tested by the subject matter, the entries in the books and the evidence in relation thereto were properly rejected. It was not the sale of merchandize, or the performance of services, or the use of property hired and returned, or the payment from time to time of money on deposit, but the payment of an outstanding debt, evidenced by a note in writing; a payment on which should be established, according to the usual course of dealing, either by a written receipt endorsed upon the note, or taken upon a separate paper. In those States where this character of testimony is deemed competent for any purpose, it is not deemed sufficient to prove the payment of money. *Decoign vs. Schreppel*, 1. (*Yeates* 347.) *Prince vs. Smith*, 4. (*Mas. Reports* 455.) *Juniatta Bank vs. Brown*, 5. (*Serg. & Rawle* 231.)

The proof in this case also lacked an essential ingredient, which seems to be absolutely indispensable to render it competent. It was not accompanied by the oath of the party who made the entries, nor by the oath of any person who knew the entries to be correct. But if this had been done, it related to a subject matter, about which the entries in the books were not admissible, and it was proper to exclude them. How far the doctrine upon this branch of the law of evidence may be applicable, or whether it will be regarded as extending to a case of any kind in this State, is not now decided, but is left open until the question shall arise.

The motion in arrest of judgment was based on the provisions in the code of practice, which requires the jury in their verdict, when either party is entitled to recover money of the adverse party, to assess the amount of recovery, (Sec 371,) and which directs the clerk to enter the judgment in conformity to the verdict. (Sec 422.)

The verdict found for the plaintiff the debt in the petition mentioned. The jury substantially assessed the amount of the recovery in the verdict. The amount is rendered sufficiently certain by the record. The judg-

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An entry by a merchant made by himself of the giving a note, and the payment thereof, after his death—held to be incompetent evidence for his partner in a suit upon the note to show payment.

A verdict under the code of practice, (sec. 371,) finding for the debt in the petition mentioned, is sufficiently certain.

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ment for the debt and interest is in conformity to the verdict. The debt in the petition mentioned carried interest as a matter of law, and the verdict for the debt was in law a verdict for the interest also. The motion in arrest of judgment was therefore properly overruled! Wherefore the judgment is affirmed.

Reed for appellants; *Nuttall* for appellees.

CHANCERY.

Scott's heirs vs Kennedy's ex'or., &c.

Case 98.

ERROR TO THE MADISON COUNTY COURT.

Settlement of administrator's accounts. Notice. Writs of Error.

January 15

JUDGE MARSHALL delivered the opinion of the Court.

Case stated.

AT the May term, 1849, of the Madison County Court, the commissioners of accounts returned a settlement of the accounts of M. M. Kennedy as administrator of James Scott, dec'd., which was ordered to lie over until the next Court for exceptions. At the June term of the Court, the record states that the settlement having laid over one Court for exceptions, and none having been filed, "was examined and confirmed by the Court and ordered to be recorded." In September, 1851, a writ of error was issued in the name of the heirs and widow of James Scott, against the executrix of M. M. Kennedy, for the reversal of the order confirming the settlement and ordering it to be recorded. Various errors are assigned in the settlement. It is also assigned for error that the plaintiff's in error had no notice of the time and place of making the settlement, which, if the writ of error be sustain-

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able, and if the alleged fact be true and be a ground of reversal, would preclude the necessity of considering the other errors assigned.

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The 6th section of the act of 1834, under which the commissioners have their authority, provides that when the executor or administrator shall apply to have his accounts stated and settled, the commissioners shall cause the heir devisee or distributee, his or her guardian, if resident in the county to be summoned to attend the settlement. And it is also provided by the 4th section that the settlement shall lie over for at least one term, for exception, and that if the Court shall approve the report or overrule the exceptions to it, it shall be ordered to be recorded, and be deemed *prima facie* evidence of the facts stated in it. We think it clear that the statute intended to provide a mode of settlement in which the parties interested, should in general have an opportunity of questioning and investigating the matters involved, so that the settlement might be the better entitled to the character of *prima facie* evidence. For this purpose the commissioners are directed to give notice &c., and their report when made is to lie over for exceptions. But the fact that notice is dispensed with, if the heir, &c., reside out of the county shows that the effect of the settlement as evidence does not depend entirely upon the fact of notice. And the direction that the report shall lie over for exceptions for at least one term, is undoubtedly one of the means provided for giving an opportunity of contesting it to those who may be interested in doing so. To parties residing in another county, no other means of knowledge or of contest are secured by the statute, but such as may arise from the notoriety of the proceedings of the County Court, and from the attention with which those who are interested in the management and settlement of estates may be presumed to regard the proceedings upon that subject. A settlement wholly *ex parte*, is of course entitled to less weight and may be more easily overthrown, than one made upon due notice to all concern-

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ed, and which has been subjected to the vigilance of parties opposed in interest. But in the absence of fraud or unfair intention, the want of notice to a resident of the county is no more calculated to detract from the weight of the settlement as evidence, than the want of notice to a non-resident of the county. And although it is certainly the duty of the commissioners to notify the resident party the statute does not make their power to state and settle and report the accounts depend upon the exact performance of this duty. Suppose, the omission to cause the party to be notified, proceeds from ignorance of the commissioners as to their own duty, or from mere inadvertence, or from ignorance or mistake, as to the residence of the party; undoubtedly the County Court would remedy the omission if apprised of it, but the report might still be acted on, and finally confirmed and recorded; and so it might be, if the Court should proceed in ignorance of the fact that any duty had been omitted, and confirm the report at the second term without notice or appearance.

The statute directing County Court commissioners to give notice to the parties interested in estates of the time of settlements, is but directory to the commissioner, and does not render a settlement made without notice void, notice according to the statute will be presumed, unless disproved.

The commissioners are permanent officers chosen for the purpose of stating and settling the accounts of executors, &c., and sworn to perform their duties. The requisition that they shall cause the heir, &c., to be notified if resident in the county, is in our opinion directory to them, and although a compliance is essential to the correct exercise of their powers, it is not essential to their existence and although the omission of the notice may affect the credence due to their acts in the particular case, it does not, therefore, make void a settlement regular in other respects, made upon vouchers and other evidence accompanying it to the County Court and there confirmed, after lying over as directed by law. The statute neither makes an *ex parte* settlement void, nor deprives it of all credence. And being made by sworn commissioners acting for the public and within the scope of their powers, it is under the statute and on general principles, and by common usage appli-

cable to such cases entitled *prima facie* to credence, so far as it accords with the evidence on which it professes to be founded, although that evidence may have been received *ex parte*, and with no other scrutiny than that which the commissioners must be presumed to have applied to it.

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But although the statute requires the commissioners to cause the heir, &c., to be notified, if resident in the county, it does not require that they should state in their report either that the notice was given, or a reason why it was not given. The assignment of error alleges as a fact that the plaintiff in error had no notice, &c. But there is no other evidence of the fact, except in the failure of the commissioners to state in their report that notice was given, or that the heirs did not reside in the county; and before it can be assumed that the commissioners have been guilty of a breach of duty, with respect to giving notice, it must be assumed, from their silence on the subject, not only that they did not give it, but also that the plaintiff in error resided in the county, which is not even alleged. That is, we are to assume from their omission to state what they are not required to state, that they omitted to do what they were expressly required to do. And as there can be no proof upon the subject in this Court, this assumption founded upon the silence of the report, if it be made a ground of reversal, is in effect conclusive, and deprives the executor or administrator of the benefit of the settlement, though it must be admitted that notwithstanding the omission of the commissioners to say anything on the subject, notice may have been given, or the fact may have existed which dispensed with it, or the parties in interest may in fact have had knowledge of the return of the settlement, or may have been actually in Court. But if there is to be no presumption in favor of the commissioners that they have performed a plain duty, it is to be recollected that they make their report to a tribunal which has general jurisdiction over the subject, and for which they have acted in stating and set-

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ting the accounts. If the omission to say anything about notice in the report is to be taken here as evidence that there was neither notice nor a proper ground for dispensing with it, we should presume that it is so regarded in the County Court, and that such a report would not be confirmed, unless the Court were satisfied that the requisition of the statute had been complied with, or unless the parties entitled to notice should appear, and the object of the statute be thus accomplished. It should be presumed that if the Court were satisfied that there was no notice when it should have been given, it would either recommit the report, or cause the parties interested to be notified of its having been made, and allow them ample opportunity for investigation and exception. If the omission to say anything on the subject is not regarded in the County Court as evidence that notice has not been given when it should have been, this would tend to prove that such omission is common, and therefore should not authorize the negative presumptions attempted to be deduced from it, and consequently should not authorize a reversal here. The record states that the settlement was examined by the Court; if so, its information tends to show that it was in the usual form, and the inference is that the Court either acted upon the presumption that the commissions had done their duty with respect to notice, or that it was satisfied of the fact by an oral response from them. And as the jurisdiction of the Court over the settlement and its confirmation did not depend upon the fact of notice, or of an excuse for not giving it, the failure to state upon its record that either had been proved before it, is not fatal to the proceeding, and does not even furnish ground for the assumption that no such proof was made. Besides, the Court may, in this case, have known that the heirs did not reside in the county, or may have supposed such to have been the fact; and the contrary is not alleged, and if it were, it could not be proved in this Court. And even if the silence of the report should authorize

the assumption that no notice was in fact given, we do not admit that it authorizes the further assumption that the heirs resided in the county, and were entitled to notice. For, as already said, the power of the commissioners to make and report the settlement, and the power of the Court to act upon it, did not depend upon the fact of notice, or upon the existence of such facts as dispensed with it. And as the commissioner might omit to give notice in a certain state of facts, or rather, as they were required to give it only in a certain state of facts, if it were absolutely certain, or were expressly stated that they did not give it, the presumption should rather be, that the facts which required it did not, than that they did exist.

Notwithstanding these considerations, we are of opinion that the report of the settlement, in all cases, should state either that notice had been given, or the reason why it was not given. But the question here is, whether the order of the county court ought to be reversed, because the report of the settlement makes no such statement. As a mere error in the form of the report, the omission is certainly no ground of reversal, and it is not even assigned as such. And for the reasons already given, we think it should not be regarded in this Court as conclusive proof that notice was improperly withheld, even if that fact should be deemed a ground of reversal.

But we are of opinion that the order of the County Court confirming a settlement, without exceptions, in a case in which it has jurisdiction is not such a final judgment or order as is the proper subject of a writ of error, or of revision and reversal by this Court on any ground. Because, 1st, there is in such a case, no judicial contest, and no judicial decision, but the order of confirmation partakes rather of the character of a ministerial than of a judicial act. 2d. There is no final adjudication or determination in favor of one person, or against another, or upon any question of property or of personal rights. 3d. The settlement and its con-

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It is proper that all reports by county commissioners of the settlement of estates should show that notice was given or the reason why it was not.

An order of the county court confirming the report of commissioners of the settlement of an estate with an administrator or executor is not such a final judgment or order as is the proper subject of a writ of error to the court of appeals. It is only prima facie.

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firmation are not conclusive either upon the parties who may have been interested in opposing them, or upon the the Court itself, which may order another settlement in which errors in the first may be corrected. 4th, They are not conclusive in any other Court, but are only *prima facie* evidence, subject to be surcharged and falsified, and they operate rather as means of preserving evidence, to the preservation of which executors and other fiduciaries are entitled, than as judgments. And being made by sworn officers under the supervision of a Court, they ought to have, and have always had the effect of *prima facie* evidence, whether made *ex parte* or not. And 5th, while the application to them by this Court of the ordinary tests to which final judgments are brought for affirmance or reversal, might produce great mischief by subjecting to reversal many fair settlements made upon actual notice, after the fiduciaries and their witnesses are dead, there is a safe, effectual, and well-known remedy, by bill in chancery, by which such settlements may be not only questioned upon their merits, with full opportunity to each party of adding proof, but the degree of credence to which they are entitled, so far as it depends upon notice or the want of it, may be fairly determined upon allegation and proof. The fact that in the many years during which the system of County Court settlements has been in operation with the effect of making them *prima facie* evidence, there has been, so far as we know, no single instance of a writ of error being sustained or prosecuted for the reversal of any one of them is strong evidence that such remedy has always been considered as we now consider it, to be inappropriate, and not allowable.

We only add, that if this order were reversed, and there were another settlement in the County Court, the heirs would not thereby obtain final redress, but would probably still have to seek it by a bill in chancery, which is now open to them with the same effect, and with full right of surcharging and falsifying or correct-

ing the settlement, which, so far as it is erroneous upon its face in point of law, may be done more effectually in a suit in equity than by writ of error, which would probably be followed by such suit, and so far as its errors depend upon matters of fact, or extrinsic evidence can be finally disposed of better in a suit in chancery, than either here or in the County Court.

Judge Hise does not concur in the foregoing reasoning and conclusions.

Wherefore, by order of a majority of the Court, the writ of error is dismissed.

Burton for plaintiffs; *Turner* for defendants.

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Field's heirs vs Hallowell & Co.

ERROR TO THE BOYLE CIRCUIT.

Devises. Wills. Remainders, vested and contingent.

JUDGE GREENSHAW delivered the opinion of the Court.

THIS suit was instituted by Hallowell & Co., against Henry Fields, jr., and others, to subject an interest which it is alleged that Henry Fields, jr., owns in a tract of land in the county of Boyle, to satisfy a claim held by them against said Fields and Owen T. Bledsoe, exceeding the sum of \$2000. It is alleged that Fields and Bledsoe are non residents and insolvent.

The interest, if any, which Henry Fields, jr., has in the land, is derived from the will of his father, Henry Fields sr.

The second clause of the will devises the land in controversy, and some slaves and personal property, to the wife of the testator during her natural life. He

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then proceeds to say in the third clause: "My will and desire is, that my executors hereinafter named, shall, as soon as convenient after my decease, proceed to make sale of the balance of my estate, real, personal, and mixed to the highest bidder—the land to be sold on credits of one and two years, and the balance of my estate on a credit of one year, and the proceeds to be equally divided among my children," requiring certain advancements made to some of his children, to be accounted for in the distribution.

The sixth clause is as follows: "At the death of my wife, I wish the estate herein devised to her to be sold and disposed of among my children, in the same manner that is herein directed, in relation to my other property."

It is agreed by the parties, that Henry Fields jr., died in Missouri, on the 28th day of February, 1849, leaving a widow, but no children; that he made a will devising all his estate to his widow; that Henry Fields sr., his father, died before him; that Susan Fields, the widow of Henry Fields sr., the tenant for life of the land in controversy, is still living; that the persons named are the children and grand children of Henry Fields sr.; that the tenant for life is still in the enjoyment of the land; and that Henry Fields jr., never was possessed *in fact* in his lifetime of any portion of the land, and that the attachment prayed for by complainants in their bill was issued and levied upon the land before the death of Henry Fields jr.,

The Circuit Court, being of opinion that the interest of Henry Fields, jr., under his fathers' will was vested, and not contingent, subjected it to sale to satisfy the demands of the complainants. And, whether this opinion of the Court below be correct, or not, is the only question which we are called upon to decide.

It is not denied by the counsel of the defendants, that if the testator had devised the land to his wife for life, remainder to his children in the specific thing devised, it would have created a vested interest in the

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children of the testator living at the time of his death, transmissible to their heirs or devisees, and subject to their debts. But, it is insisted that, as the land, according to the will, is to be converted into money at the death of the tenant for life, then to be equally divided among his children, time is annexed to the substance of the legacy, and that, consequently, it does not vest till the termination of the life estate, when the conversion is to take place.

Whether the legacy be vested or contingent, does not, in our opinion, at all, depend upon the fact that the land is directed to be converted into money. The legal effect of this direction is, that the gift is to be considered as a bequest of money, and not as a devise of land, upon the principle that what ought to be done, is considered as done. The *time* however, at which the sale of the land is to be made, and the proceeds to be divided, being postponed till the happening of a future event, to-wit: the termination of the life estate, may have some influence in determining whether the legacy is vested or contingent. If the testator has manifested an intention not to bestow a present legacy, to be enjoyed in future, but, to give no legacy, in fact, till the death of his wife, then *time* is of the essence of the gift, and the legacy does not vest till after the termination of the life estate.

In *Jarman on wills*, page 756, it is said that, "a pecuniary legacy, whether charged on land or not, given to a person *in esse* simply, *i. e.*, without any postponement of payment, is, of course, vested immediately on the testator's decease. In regard to sums payable out of land *in futuro*, the old rule was, that, whether charged on the real estate primarily, or, in aid of the personalty, they could not be raised out of the land, if the devisee died before the time of payment; but this doctrine has undergone some modification; and the established distinction now is, that, if the payment be postponed, *with reference to the circumstances of the devisee of the money*, as in the case of a legacy to A

A devise to one for life, and at the death of tenant for life, the land devised to be sold and the proceeds divided amongst the testator's children, gives a vested interest in the land to the children to be enjoyed in future: *Arnold's ex'ors. vs Arnold's adm'r.*, (11 B. Monroe, 89.) *Williamson's ex'ors.* 767. (5 Dana, 434.)

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to be paid to him at his age of twenty-one years, the charge fails, as formerly, unless the devisee lives to the time of payment, and that, too, though interest in the mean time be given for maintenance. But, on the other hand, if the postponement of payment appear to have *reference to the situation or convenience of the estate*, as, if land be devised to A for life, remainder to B in fee, charged with a legacy to C, payable at the death of A, the legacy will vest *instantly*; and, consequently, if C die before the day of payment, his representatives will be entitled; the raising of the money being evidently deferred until the decease of A, in order that he may, in the mean time, enjoy the land free from the burthen."

That the legacy, in this case, to the children of the testator, was postponed in enjoyment, till after the death of his wife, for considerations not personal to the legatees, but for considerations pertaining to the condition of the estate from which the legacy was to be raised, owing to the life estate of the wife, is, we think, entirely clear; especially, when the disposition of that part of the estate is considered, which was not devised by the testator to his wife. The sale of that part of his estate is not postponed, but is directed to be made, as soon as convenient after the decease of the testator, and the proceeds to be equally divided among his children. Such, evidently, would have been the disposition of the land in controversy, had it not been for the life estate of the wife created therein. This is the only reason why this land was not to be sold at the death of the testator. The sale of the land and payment of the legacy, was deferred until the death of the wife, in order that she might enjoy it in the mean time, for no other reason.

It is our opinion, therefore, that Henry Fields jr., took a vested interest under the will of his father at the time of his father's death, though that interest could not be enjoyed till the death of his mother; and the consequence is, that that interest is liable to the debts

of Henry Fields, jr., notwithstanding he died before the termination of the life estate of his mother.

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The law favors that construction which will render estates vested, and not contingent; and a construction in the present case which would make the interest of the testator's children contingent, and not vested, would defeat in our opinion, his obvious intention; such a construction would deprive the descendants of all his children, who might die, before the tenant for life, of any interest under the will, and the legacy would go to those only of his children who might survive his wife. There is nothing in this case, which would authorize the conclusion, that the testator intended to deprive his grand-children of all benefit under his will; but, on the contrary, we think it manifest, that he had no such unnatural intention.

In the case of *Arnold's ex'ors. vs Arnold's adm'r.*, (11 B. Monroe, 89,) the disposition of the testator's slaves, is analagous to the disposition of the land in the case under consideration, except in one particular:—the slaves in that case, at the death of the testator's wife, were not to be sold and the *proceeds* divided, but the *slaves themselves*, were to be equally divided among all his children. And, in that case, it was decided that the testator's children took a vested interest. Now, if, where the testator directs his slaves to be divided among his children in kind, at the termination of a life estate in his wife, the children take a vested interest, can there be any propriety in saying that, where, at the termination of the life estate, the *proceeds of the sales of the slaves* are to be divided among the testator's children, they take a contingent, and not a vested interest? Certainly, the rule of construction in the one case, ought to be the rule of construction in the other.

And there is no difference in principle where land is directed to be sold, instead of slaves, and the proceeds to be divided.

In our opinion, Henry Fields, jr., took a present vested interest in the bequest of his father, but not to be

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enjoyed till the death of his mother. The bequest created a present fixed interest immediately upon the death of the testator, as *debitum in presenti solvendum in futuro*: *Williams on Executors*, 767.

The principles and arguments in the cases of *Bowling's heirs vs Dobyn's adm'r.*, (5th Dana, 434,) and of *Arnold's ex'ors. vs Arnold's adm'r.*, *supra*, are referred to, as elucidating the question involved in the present case.

Wherefore the decree of the Circuit Court, being in conformity with the principles of this opinion, is affirmed.

Dunlap for plaintiffs; *Boyle and Harlan* for defendants.

OR. PETITION

Graham vs Swigert.

Case 100.

ERROR TO THE FRANKLIN CIRCUIT.

Supersedeas Bonds. Proceedings in rem et personam.

January 17.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

Case sta'd.

THIS was an ordinary proceeding by petition in which Graham was plaintiff and Swigert was defendant on a supersedeas, bond executed by the defendant as security for Strader, Gorman, and Armstrong, to remove a case decided by this Court, to the Supreme Court of the United States.

Graham filed a bill in the Louisville Chancery Court against Strader and Gorman as owners of the steamer Pike, to recover damages for the asportation of three slaves from Louisville, Ky., to Cincinnati, Ohio, and their consequent escape to Canada. A decree was ren-

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dered by the Chancellor, which was not satisfactory to the parties, and the case was brought to this Court, and the decree reversed on the errors assigned by Graham. (See opinion 5, B. Monroe 173.)

After the return of the cause to the Louisville Chancery Court, on the 6th day of November 1845, that Court rendered the following decree, viz:

"The Court being now advised, and the jury empannelled herein having found the facts submitted to their inquiry for the complainant, and assessed his damages at \$3,000, it is now ordered and decreed that the complainant is entitled to have so much for his damages by him sustained, &c., and unless the said sum be paid by the 15th day of this month, or the said steamboat Pike, her engine, tackle, and furniture, be then forthcoming to be sold for the purpose of raising the same, together with the complainants' costs, &c., and in as good plight and condition, as when the bond of said Armstrong and C. M. Strader herein was executed, or of a value sufficient to satisfy the said sum and costs, the Court will make such order as shall be necessary, against the obligors in said bond to enforce said judgment, &c."

Afterwards, viz; on the 28th day of the same month, the following order was made. This day "came the complainant, by his council, and produced a copy of the order or decree herein, with an endorsement thereon of its service on Charles M. Strader, and John Armstrong, and they not appearing in Court, although now solemnly called, whereupon and by the consent of the parties said decree is to stand and be considered as a final decree in the cause, from which an appeal may now be taken."

The case was accordingly brought to this Court upon an appeal by the defendants, and the decree affirmed at the June term, 1847.

Thereupon the case was removed by the defendants to the Supreme Court of the United States, and the supersedeas bond upon which this action was brought,

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was executed. The act of Congress under which the proceeding was had requires the plaintiff in error to give good and sufficient security that he shall prosecute his writ *to effect*, and answer all damages and costs if he fail to make his plea good. (1, *Story's laws, U. S. p. 60.*) In December, 1850, the Supreme Court of the United States dismissed the writ of error, upon the ground that the Court had no jurisdiction of the case.

The supersedeas bond sued on, is in the penalty of six thousand dollars, and contains the following condition, viz: "Whereas the Louisville Chancery Court, on the 28th day of November 1845, in a chancery suit wherein the said Christopher Graham was complainant, and said Jacob Strader, James Gorman, and John Armstrong were defendants, decreed, that the decree of the 4th of November, 1845, against the said Jacob Strader, James Gorman, and John Armstrong for three thousand dollars, should stand with costs, from which said decree, the said Strader and others prayed an appeal to the Court of Appeals for the State of Kentucky, and on the 4th day of October, 1847, the Court of Appeals affirmed the decree of the Louisville Chancery Court with damages and costs, and the said Jacob Strader, James Gorman, and John Armstrong having sued out a writ of error to the Supreme Court of the United States to reverse the said decree and affirmance. Now the condition of the foregoing obligation is such, that if the said Jacob Strader, James Gorman, and John Armstrong shall prosecute the said writ of error with effect, or on failure thereof, shall pay to the said Christopher Graham, the amount of the decree of the Louisville Chancery Court, with the damages and costs and all damages, interest, and costs that may be awarded against them in the Supreme Court of the United States, then this obligation to be void, otherwise to remain in full force and virtue.

The plaintiff in the petition, claimed thereon, and prayed judgment against the dependant for, three thousand dollars, the amount of the decree of the Louisville Chancery Court with interest thereon from

the 4th November, 1845, and the costs of said chancery suit in the Louisville Chancery Court, and in the Court of Appeals.

The defendant, in his answer, contended that he was not liable upon the bond for the three thousand dollars, ascertained by the decree of the Louisville Chancery Court, to be due to the plaintiff, or for the costs of that suit or for any thing except the costs in the Court of Appeals. He insisted that the bond, according to its legal effect, did not impose upon him any such responsibility; and if it did, that it was more comprehensive than was required by law, and was executed by the mutual mistake of himself and the Clerk of the Court who took it; as he only agreed or intended to execute such a bond as the Clerk was authorized and required by law to demand and take. And further, that the condition in the bond to pay the amount of the decree of the Louisville Chancery Court, was made and inserted by the Clerk without order or authority of law, and was not obligatory, but the bond, in consequence thereof, was wholly void and inoperative.

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The defence relied upon.

The parties, by consent, submitted the law and facts of the case to the Court, without the intervention of a jury, and the Court decided that the defendant was only liable upon the bond for the costs in the Court of Appeals, and not for the amount of the decree of the Louisville Chancery Court, and rendered judgment accordingly. From that judgment the plaintiff has appealed.

The judgment of
the Circuit
Court.

It is obvious that the stipulations contained in the bond, are sufficiently broad and comprehensive to secure the payment of the amount, to which the plaintiff was entitled under the decree of the Louisville Chancery Court. The legal effect of the bond is therefore the subject to be examined and considered; and this depends in a great degree upon the nature and character of the decree referred to. If it were substantially a decree against the defendants for money, then there can be no question that the law required them, in case they appealed, or suspended its execution by

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the supersedeas, to secure to the plaintiff the payment of the amount, and the bond imposes a liability to that extent upon the obligors.

The condition of the bond required by the act of Congress is substantially the same as is required by the laws of this State in the case of appeals from judgments and decrees. It is therefore contended, that the decisions of the court upon the effect of such bonds, must determine the extent of the obligation of the surety in this case; and that according to the principles of those decisions, he is not liable for the amount of the decree of the Louisville Chancery Court.

The cases referred to for the purpose of sustaining this proposition, are *Talbot vs. Morton*, (5th Litt. Rep. 326.) and *Sumrall, et. al., vs. Reid*, (2., Dana 65.) In both these cases an appeal was taken from a decree to foreclose a mortgage on real property, and subject it to sale for the payment of judgments at law. In the first it was held that the bond was sufficient, although it did not secure the payment of the judgment at law, as the decree rendered was against the mortgaged estate, and there was no decree for money. And the Court in that case said, "it cannot be contemplated by law, that the bond should secure the real estate or its value, or that accidents of fire and destruction of the estate are to be provided for in the bond. In the case of *Sumrall, et. al., vs. Reid, supra* the appeal bond was conditioned to pay the amount recovered by the decree, and costs; and it was decided that there was nothing recovered by the decree, and it only subjected the real estate in the mortgage to the payment of a judgment at law, there was no liability on the surety for the debt.

The principle attempted to be deduced from these cases is, that the law prescribes one uniform condition to such bonds, but discriminates between the liability imposed by a breach of the condition, in the different classes of cases. In appeals from a judgment or decree in *personam* the liability extends so far as to secure

the judgment or decree; but that in appeals from a decree *in rem*, the demand asserted in the suit, and to obtain the payment of which the proceeding is instituted, is not secured by the bond.

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These cases have not settled the doctrine in the manner and to the extent contended for. They only decide that in cases where there is a mere decree of foreclosure made for the purpose of subjecting real estate to the payment of judgments at law, and an appeal is taken, that the bond required by law does not secure the amount of the demand for the payment of which the land is decreed to be sold. This, according to the reasoning of the Court in the first case, results, in some measure, from the nature of the property which is looked to for the security of the debt. It is permanent, and not subject to loss, removal, or destruction, and consequently a stipulation in the bond, for its security is unnecessary, and not contemplated by law.

In case of appeal or writ of error from decrees of foreclosure, the appeal or supersedeas bond does not secure the debt for which the land is directed to be sold: (6 Litt., 365.)

If however, it be conceded, that the same doctrine ought to apply, to all decrees merely for the sale of mortgaged property whether personal or real, it by no means follows, that it ought to be extended to that class of cases, where personal property is attached by a proceeding in chancery instituted for the purpose of obtaining the payment of the complainants demand, where the debtor has a right to retain the property by executing a bond, especially when the appeal is taken by the debtor himself, having the property in his possession at the time. The effect of the appeal may be to diminish very materially, if not to destroy the security of the complainants demand, by postponing the execution of the decree, until the sureties in the bond executed by the debtor, become insolvent, and the property itself be consumed or disposed of, and placed beyond the reach of the creditor.

In the case of *Worth et al vs Smith*, (5 B. Monroe, 04,) it appeared that a number of creditors were proceeding at the same time to subject, by attachments, the Steamer John Mills, to the payment of their sever-

The same might be the case where personal property was attached and sold, and the fund in the hand of the

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Court. See
Worth, &c., vs
Smith, (5 B.
Monroe, 504.)
But it might be
different where
the property at-
tached has not
been sold, or
was in the pos-
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al debts, that the steamer had been sold, and the proceeds of the sale were under the control of the Court. In that state of case, a contest arose among the creditors, about the disposition of the fund, and part of the creditors being dissatisfied with the decree of the chancellor upon the subject, appealed to this Court, and the decree was affirmed. A suit was then brought by the preferred creditors, against the surety in the appeal bond, and it was held that he was only liable for the costs and damages awarded in this Court, and not for the sums decreed to the creditors out of the fund for distribution. The ground of the decision was, that the appeal did not affect the security of the fund, that notwithstanding the appeal, it remained under the control of the chancellor, who was not thereby restricted from taking any step which he might deem proper to secure it. This case does not, however, settle the principle that an appeal taken by the debtor from a decree to sell personal property which had been attached and remained in his possession, would not impose any liability upon the obligors in the appeal bond, for the amount of the decree. It seems rather to authorize an opposite inference, inasmuch as in the case last mentioned, the appeal would have the effect to suspend the action of the chancellor altogether, and deprive him of all control over the property, and of all power to provide for its security.

But let this question be disposed of as it may, when it arises, the decree in this case in our opinion partakes of the nature of a personal decree, and was virtually and in effect a decree against the parties, for whom the defendant became surety in the bond; and consequently, is not within the operation of the principle applicable to the cases where the proceedings are exclusively in rem.

The statutes under which the proceeding was instituted in the Chancery Court, made the defendants liable to the action of the party aggrieved, either at law or in chancery: (1 Vol. Stat. Law, 260,) so that the chan-

Where there is a
personal decree
and it is sus-
pended by writ
of error to the

...

cellor had the power to render a personal decree against them, for the sum adjudged to the complainant. The boat or vessel, in which the slaves were removed out of the limits of the commonwealth, is also made liable, and may be condemned and sold to pay and satisfy the damage sustained by the complainant, and the costs of suit. But the proceeding against the boat, is merely ancillary to the main object of the suit, and intended to aid in its accomplishment, by furnishing means to be applied to the satisfaction of the decree. The proceeding was not exclusively in *rem*, but was both in *rem* and in *personam*.

The damages sustained by the complainant had been ascertained, and a decree rendered for the amount. The defendants had been required to produce the attached property, and had failed to comply with the requisition. The chancellor could have ordered an execution to issue against them immediately for the sum decreed and the costs of the suit, or could have enforced the payment of the amount, by proceeding against the parties in the bond executed for the forthcoming of the property. In this attitude of the case, the parties agreed that the decree pronounced should be treated as a final decree, and the defendants obtained an appeal. The effect of the appeal was to suspend the execution of the decree, and to prevent the chancellor from ordering an execution to issue against the defendants, or to enforce the bond. The decree as it was rendered would not have authorized an execution to issue against the defendants without an additional order, but still the decree was personal, and imposed upon the defendants the duty to pay the money to which the complainant was entitled, and the enforcement of this duty was prevented by the appeal. There is a clear distinction between this case, and the cases that have been referred to. In those cases, the defendants were not personally liable and the chancellor had no power to order an execution to issue upon the decree. In the case of *Werth et al vs Smith*, the appeal

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Supreme Court of the U. S., the surety in the bond is liable for the whole amount of the decree upon its affirmation in that Court. Though a steam boat may have been attached which would also be liable for the decree. The proceeding being first in *rem* and in *personam*, but lastly in *personam*, as the boat was not delivered.

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was not taken by the debtor, but by part of the creditors, whose claims had been postponed, and who of course were in no manner responsible for the fund in contest, and against whom no decree had been rendered for the payment of money. And in that case, the Court said, that as the surety might have executed the bond alone, without his principal, if he were to be made liable for the fund in contest which had been decreed to the preferred creditors, his liability would exceed that of his principal, against whom no decree for the payment of the fund or any part of it had been rendered. That reasoning however does not apply to this case. Here a decree had been pronounced against the principals of the surety. They were personally liable for the sums decreed. The appeal was evidently taken to prevent the enforcement of that liability. The nature of the proceeding had undergone a radical change. It had become, by the failure to deliver the property attached, exclusively personal. It was no longer a proceeding *in rem*, for there was no property for the chancellor to act upon. He could have proceeded against the surety in the bond, but his liability was personal. The remedy however was not confined to the liability of the surety, but extended to the defendants, who were personally liable for the amount of the decree by the express provisions of the statute which authorizes the party aggrieved in such a case, to sue in chancery.

If the chancellor had rendered a decree that the defendants should pay the sum adjudged to the complainant and the costs of the suit, or if he had ordered an execution to issue therefor against the defendants, there could then have been no contest, in respect to the liability of the surety for the amount of the decree. Is there any substantial difference between such a decree and the one that was rendered, and which the parties agreed to treat as final? Would not the extent of the liability of the defendants be fixed and determined by either, especially as the decree rendered was made final

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by the agreement of the parties, and the chancellor had no power to increase or diminish the amount of damages adjudged to the complainant? and would not both the decrees be personal? These two essential features being similar, there seems to be no material difference in the substance of the decrees. In one case the clerk could issue an execution without any order of Court, in the other an order would be necessary to enable him to do it. That order the chancellor could and no doubt would have made, had not the defendants prevented him, by agreeing that the decree should be regarded as final, and then suspending its operation by an appeal. It might be contended with great plausibility, that as the defendants by their own act, prevented the Court, from making the order, which would obviously have resulted from the state of the proceedings at the time, and which would have been direct and personal in its character, and in case of an appeal have indisputably required the security, of the amount ordered to be paid, if its payment were suspended, they should be regarded as having agreed that the decree as it stood, should have the same legal effect, that it would have had, if an order had been made, requiring them to pay the amount, or authorizing an execution to issue against them for it. But whether their agreement should or should not be considered as imparting to it such a legal effect, we do not deem material, inasmuch, as it was a decree for money, final in its character, for which the defendants were personally liable, and the enforcement of which against them personally, was suspended by the appeal, and subsequent writ of error from the Supreme Court, of the United States, prosecuted by them. The want of an order, requiring the amount to be paid, or authorizing an execution for it to issue against the defendants, affected merely the enforcement, of the decree and not the rights, or the responsibilities of the parties under it. And as it defined, and determined the extent of those responsibilities, and they were pecuniary and personal in their character, it

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was in our opinion, of that description, which made it the duty of the defendants in executing the bond sued upon, to secure its amount, in the event of their failing to reverse it.

The decision of the Circuit Court, is in conflict with the views expressed, and the principles settled in this opinion, and is deemed erroneous.

Wherefore, the judgment is reversed and cause remanded for a new trial, and further proceedings consistent with this opinion.

Harlan for plaintiff; *M. Brown and Ripley*, for defendant.

PETITION.

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ERROR TO THE HICKMAN CIRCUIT.

Case 101.

Sabbath day.

January 19.

JUDGE MARSHALL delivered the opinion of the Court.

Case stated.

This petition was brought by Catlett and Buck, upon a note executed to them by George W. and William W. Ray, on the 28th of October, 1849, for the payment of \$566.79, eighteen months after date. The defendants filed two pleas in bar, each of which was adjudged bad on demurror, and a third plea afterwards offered, having been rejected by the Court upon objections made, and a judgment was rendered against them for the amount of the note with interest, &c.

The first plea merely states that the note sued on was executed, delivered, and received on the 29th day of October, 1849, and that the day was Sunday, the Christian Sabbath. The second plea states, in addition, that at the date of the note the plaintiffs were drag-

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gists, and were engaged in business as such, and that the note was executed and delivered by the defendants to the plaintiff in the transaction of their ordinary business, that the day of its execution and delivery was Sunday, the Christian Sabbath, and that its execution and delivery were not of the ordinary offices, or of daily necessity or charity, nor were the plaintiffs, or either of them, members of a religious society which observes as a Sabbath any other day of the week than Sunday.

These pleas are founded upon, and bring in question, the construction of a provision contained in the 36th section of the act of 1801, (*Stat. Law* 1275,) which is in the following words, viz :

“ If any person, on the Sabbath day, shall himself be found laboring at his own or any other trade or calling, or shall employ his apprentices, servants, or slaves, in labor or other business, whether for profit or amusement, unless expressly permitted by this act, (and no work or business shall be done on the Sabbath day, unless the ordinary household offices of daily necessity or other work of necessity or charity,) he shall forfeit the sum of ten shillings for every offence, deeming every apprentice, servant, or slave so employed, and every day he shall have been employed as constituting a distinct offence. Provided, however, that no person who is a member of any religious society who observes any other day of the week, etc., shall be liable, etc., so that he observes one day in seven agreeable to the regulations aforesaid.”

This is the first case, so far as we know, in which it has been attempted to bring this statutory prohibition to bear upon any civil transaction made or entered into on the Sabbath day. And if it be conceded that the infliction of a penalty for doing the particular act described implies a prohibition of such acts, and that the Courts must regard every transaction which comes within the prohibition as unlawful, and therefore as being void or unenforceable, the fact that for nearly fifty

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years, during which time there have been innumerable private transactions on the Sabbath day, and there has been no attempt to enforce this consequence by plea, requires that, while the statute shall be fairly construed with a view to the accomplishment of its objects, it shall not be extended by construction, so as to embrace cases which do not come clearly within its terms and obvious meaning.

One object of the statute was to secure the observance of that decorum and quiet which in a Christian country is due to the Christian Sabbath; another object was to secure to all laborers, and especially to apprentices, servants, and slaves, which include all classes of persons who are in the employment of others, one day of rest in seven. It imposes a penalty upon any person who, on the Sabbath, may labor in any trade or calling, or who may employ his apprentices, servants, or slaves in any work or business except necessary household offices, or other work of necessity or charity. We regard the parenthetical prohibition in the clause relating to apprentices, servants, and slaves, as applicable to the employment of such persons, and as showing what is permitted to be done by them. Following, as it does, the words, "unless expressly permitted by this act," which certainly apply to the employment of apprentices, etc., the parenthesis is understood as containing that permission, and as operating with the previous words which have been quoted as an exception, showing in what work or business apprentices, etc., may be employed. But it is not an exception to the first clause which speaks of any person laboring in his own or any other trade or calling. And indeed this clause requires no such exception, because the performance of the excepted acts by a man for himself would not be ordinarily regarded as laboring in his own or any other trade or calling. Then in order to bring an individual within the penalty of the statute, it must be shown that he himself labored on the Sabbath in some trade or calling, or that he employed others in work or

A plea to an action upon a note that it was made and delivered on the Sabbath day, without any aver

business not permitted by the act. And if this is attempted to be done by plea in avoidance of a contract entered into on Sunday, and is to have the effect, if successful, of inflicting a penalty generally much greater than that imposed by the statute, the offense must be shown with at least as much certainty and particularity as if the plea were a presentment on which the statutory penalty is claimed. We are not prepared to decide that the mere execution and delivery of a note, or its mere acceptance, on Sunday, is laboring in any trade or calling, unless it be a part of some other transaction done also on Sunday, which may be regarded as labor in some trade or calling. And if the mere execution and delivery of a note could be deemed such labor, we are satisfied that its mere acceptance could not, and the person accepting it would not, be involved in any consequence of a breach of the law by the other, unless he knew that the note had been made as well as delivered on Sunday. Neither of the pleas avers such knowledge, and neither of them shows that the transaction on which the note was founded took place on Sunday, or that it was a transaction coming within the description of any trade or calling, or that it was affected on Sunday by any person in the employment or by the authority of the plaintiffs. It follows that whatever might be the consequence with respect to a contract clearly within the prohibition of the statute, as to which we do not decide, neither of the pleas makes out such a case, and therefore the demurrer to each was properly sustained.

In the third plea, which was afterwards offered, there seems to be some attempt to obviate the objections to the two first pleas, by stating that the note was executed on Sunday, in consideration of drugs, medicines, etc., then and there sold by the plaintiffs to the defendants, in the transaction of the ordinary business of the plaintiffs. But although the plea states twice the day of the month and year in which the note was executed and delivered, it does not state in terms

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ment that the payee knew those facts, or that the transaction which induced the giving of the note took place on the Sabbath day or that it was a prohibited act, is not a good plea.

Nor is a plea avering that plaintiffs were druggists and that the note was given for drugs sold on a particular day of the week, without avering that it was on Sunday, a sufficient plea.

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the day of the month on which the drugs were sold, nor that it was done on Sunday, but uses with reference to this fact the words "then and there," which, though generally sufficient, are also generally formal and malleable, and therefore not necessarily precise in confining the reference to the exact day previously named. Besides, the plea does not state that the drugs, etc., were then and there delivered, nor show what was done towards a sale, or in relation to it, so as to enable the Court to say that the plaintiffs did in fact labor in their own or any other trade or calling on the Sabbath. The fact that a note was executed and delivered in consideration of the drugs, is not conclusive as to an actual sale having been previously made. And the plea cannot be helped out by inference from its statements, however probable. There was, therefore, no abuse of the sound discretion of the Court in rejecting this plea.

We are aware that in giving a strict construction to these pleas and to the statute on which they are founded, we may not have followed the course of decision in some other States where statutes on the same subject have been enacted. But it is probable that these statutes are not precisely like ours in language, and the legislation of some of those countries may have intended more than to secure public decorum and quiet, and abstinence from labor on the Sabbath. Our statutes protect religious worship from disturbance, but can neither compel attendance upon it, nor contribution towards its maintenance, nor any devotional duties or observances. And we are satisfied that the particular clause now in question had no other object in view but that of enforcing decorum and quiet on a day regarded as holy by a large portion of the community, and of securing rest from labor on that day, (unless where some other day is kept as a religious observance,) to all persons employed to labor for others. It is quite probable that the legislature did not think of any effect which this provision might have upon isolated transactions of a pri-

vate nature, nor indeed on other transactions in the form of contracts. And if, under the judicial duty of maintaining the integrity of the laws, every transaction coming within the prohibition of the statute is to be regarded as void or unenforcible, we feel bound in applying this consequence, probably not within the contemplation of this legislature, to construe strictly both the statute and the pleadings under it.

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We refer to the case of *Geere vs. Putnam*, (10, *Mass. Rep.* 317,) as deciding that in that State a note executed on Sunday is not necessarily void. And in Vermont, although it has been decided that a contract finally executed on Sunday is void, (6, *Verm. Rep.* 219,) it has also been decided that, if not fully closed on that day, the contract is not void, because some of its terms might have been fixed on that day, or indeed because most of the business out of which the consideration of the contract arose, was transacted on that day. (18, *Verm. Rep.* 379.) And in *Adams vs. Gay*, (in which these decisions are referred to, and which was decided by the Supreme Court of Vermont,) it is also affirmed as a principle for which the case of *Williams vs. Paul*, (6, *Bingham* 603) is referred to, that although the contract be closed on Sunday, yet if affirmed on a subsequent day, it becomes valid. And it is further asserted by the Court, that if either party has done or given anything under such a contract, a refusal of the other party upon a subsequent demand to make restitution or compensation should be regarded as a confirmation of the contract. (See the case reported in 10th *Law Reporter*, 348.) These conservative principles, engrafted by the Courts on the statutes of other States as being necessary to prevent the mischief and frauds which might be perpetrated under color of law, confirm the propriety of the strict construction which we have adopted, and the cases referred to afford authority for, rather than against the conclusion which we have already expressed in the present case.

A contract completed on any other day is not void because some of its terms were agreed upon on Sunday: 18 *Vermont Rep.* 379. A note given on the Sabbath is not necessarily void: 10 *Mass. Rep.* 319.

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COUNTY
COURT
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TOWN OF NEW-
PORT.

Wherefore, the judgment is affirmed.
M. Brown for plaintiff, *Harlan* for defendants.

CHANCERY.

**Campbell County Court vs Town of
Newport.**

Case 102.

APPEAL FROM THE CAMPBELL CIRCUIT.

Towns. Dedications to public use. Trusts.

January 22.

JUDGE HISE delivered the opinion of the Court.

Case stated in
the bill.

THIS suit in chancery was instituted by the "Town of Newport," against Samuel Winston and others, as Justices of the County Court of Campbell county, and against Charles J. Helm and others as lessees holding possession of the public buildings erected upon the public square in the town of Newport, under the Campbell County Court.

The complainant alleged in substance that the public square in the town of Newport was set apart and devoted or dedicated, by the proprietors of the land, to the use of the inhabitants thereof, and of the public generally, at the time the original plan of the town was adopted and a survey and plat thereof was made in February, 1792, by the agent of James Taylor, the owner of the land. That on the plat then made, the words "Public Square," was, at the time of its execution, written across the group of lots, upon which the public buildings were subsequently erected by the County Court, and hence it is insisted that before the county seat was located at Newport, the title to this public square was vested in the town, or rather that it was legally dedicated to the perpetual use of the inhabitants and public, by the original proprietors.

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If the fact as alleged, be conceded that when the agent of the proprietor, originally, in 1792, laid off the town of Newport, he executed a survey thereof, and had a map or diagram prepared, representing the plan of that town, and that the words "Public Square," was written across the lots in contest, on the map, as exhibited to those who purchased lots: in such case, the right of the town to the continued and perpetual use of the square for public purposes, could not be questioned. The principles approved in the case of the trustees of *Augusta vs Perkins*, (3 B. Monroe, 440,) of *Rowan's ex'ors. vs Portland*, (8 B. Monroe, 249,) of the *Trustees of Dover vs Fox*, (9 B. Monroe, 200,) and of *Wickliffe vs the City of Lexington*, (11 B. Monroe, 163,) would be decisive of the question in that aspect of the controversy. But the defendants answer, and admit that a map of the town was executed in February, 1792, yet they deny in very positive terms that the block of lots in question were indicated on the plat or map of the town then executed as a public square, or that the words "public square," were then written on the plat at any place, and they insist that this was not done until 1795, when under the direction of another agent of James Taylor, another survey was made, and a new map executed, on which the words "public square," were, for the first time, written across the lots in contest, in view of an understanding or agreement between the proprietor's agent, and the justices of Campbell county, that the county seat should be established at Newport. And it is in proof that a re-survey of the town of Newport was made in August, 1795, by John Roberts, and a new map of the town prepared, showing a considerable extension of its limits, embracing other blocks of lots and containing two open squares, on one of which is written "Public Square," on the other, "Bellvere Square," without any lines drawn across them sub-dividing them into different lots with their numbers written on each, as was done on the plat dated in February, 1792. The

Defense set up
in the answer.

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A dedication of ground in the interior of a town to public use as a public square, by conveyance for such purpose to the justices of the County Court upon condition that it be used as a public square, passed no title for the benefit of the County upon the removal of the seat of justice, but a right vests in trust for the benefit of the town for public purposes: *Wickliffe vs City of Lexington*.

proof does not clearly establish the fact assumed in the bill of complainant, that the square in contest was dedicated for the public use and benefit of the town of Newport, as *far back as 1792*. And it is distinctly denied by defendants, that there was any such dedication at that time.

But on the 1st September, 1795, after the re-survey was made of the town, the proprietor of the land, by his agent, executed a deed to the trustees of Campbell county, and their successors, by which, in consideration "of the said justices and the justices of the Court of Quarter Sessions having fixed on Newport, at the confluence of the Ohio and Licking rivers, for the seat of justice for said county, he conveyed to them and their successors the ground in contest as a public square, to be appropriated as they may think proper, for the use of public buildings." A few days after this deed was made, to wit: on the 7th day of September, 1795 a new plat or map, and written plan of the town was executed by the proprietor, through his agent, which was acknowledged and recorded in April, 1796. The town was established by law in December, 1795. The county seat was removed from Newport in 1840, and the public square and the public edifices thereon were, after that time, no longer used for county purposes, or for the purpose of holding therein the Circuit and County Courts. But notwithstanding its abandonment for all the public purposes and uses for which it was destined by the deed to them and their successors, yet the county justices still claim the title to the square, and have assumed the right to apply this public square, and the public edifices built thereon, to private purposes by renting the same to Helm and others, who hold possession under said trustees.

It must be conceded that there was a dedication of the square in contest in September, 1795, for public purposes at least, and in the most solemn and authentic form by which it could be made, to wit; by a deed of conveyance from the proprietor, and that the subse-

James Taylor in 1795 laid off Newport, and laid off a public square in 1796, and conveyed the square to the

quent, if not the anterior, public use of the square for public purposes, for a period of forty-five years, or more, was enjoyed. It is true, by the inhabitants of the county of Campbell, in common with the citizens of the town of Newport, the County Court trustees and their successors, by the express terms of the grant, were vested with the naked legal title in consideration that the seat of justice should be located at Newport, and upon the express trust that the square should be appropriated for the use of public buildings—*public*, not private. Of course the square and the public edifices which the County Court might erect thereon must be used and occupied alone for public purposes, and if abandoned by the County Court justices for the public purposes for which the square and buildings was destined. They have no legal or equitable right to apply them to private and individual uses and purposes, as they have done.

And upon their abandonment of the square and buildings, then a dedication for public use results by implication in favor of the inhabitants of the town of Newport, because, 1st; they have had from the year 1795, if not from before that time, until the attempt of the County Court to make a private appropriation thereof, the public use in common with Campbell county, of the square and public edifices thereon.

2d. Because the lots were sold and purchased in the Town of Newport surrounding the square, and in other parts of the town, upon the implied promise on one side, and faith on the other, at least from the year 1795, that the public square existed, and should forever continue to exist as such, for the public use and convenience of the town. This view brings the case substantially within the scope of the principles approved in the cases referred to above, and especially in the case of Wickliffe against the city of Lexington. There are various untenable grounds assumed in the assignment of errors, and in the argument of counsel, upon which a reversal of the decree of the Circuit Court is de-

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Justices of Campbell county, to be held and used as a public square for public uses and purposes so long as the seat of justice continued at that place. In 1840 the seat of justice was removed from Newport: Held that the conveyance being in trust for public purposes, and the seat of justice being removed, that a trust resulted in favor of the town for public purposes.

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manded which it is not deemed important or necessary to notice, as they are considered to be unavailable by this Court.

Whereupon the decree of the Circuit Court is affirmed.

Tibbatts and *Helm*, for appellants; *Morehead* and *Stevenson*, for appellees.

CHANCERY.

Maria vs Kirby.

Case 103.

APPEAL FROM THE FAYETTE CIRCUIT.

Slaves. Emancipation. Habeas Corpus.

January 17.

JUDGE MARSHALL delivered the opinion of the Court.

Case stated.

In 1848, Mrs. Rebecca Kirby, a resident citizen of Kentucky, and the owner of a female slave, Maria, took Maria with her on a journey, or trip of pleasure, to the eastward, and during a delay of three or four days in Washington county, in the State of Pennsylvania a writ of *habeas corpus* was issued on the petition of a colored man named Brown, commanding that Maria, alleged to be illegally detained, etc., should be brought before the judge. And upon the return of the writ showing that Maria was claimed as a slave purchased in Kentucky, she was discharged from custody and restraint, and declared to be a free woman, to go where she pleases without coercion or restraint from any one. But Maria returned to Kentucky with her mistress, and was here held as a slave until January, 1850, when she filed this bill claiming that she was free by virtue of the proceedings and judgment or award on the writ of *habeas corpus* in Pennsylvania.

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The defendant, Kirby, besides demurring to the bill, answered denying the alleged right to freedom admitting the proceeding on the *habeas corpus*, except that she neither made nor authorized any return in her name on the writ. She also denies that the writ was issued at the instance and with the consent of Maria, and states that all that occurred before the judge was, that Maria, on interrogation, said she would rather go back to Kentucky as defendant's slave, than to remain in Pennsylvania. As to this, and all other material facts, the answer is supported by the only deposition in the cause. And it is to be observed that the order or judgment does not simply declare Maria to be free, but discharging her from restraint, declares her to be a free woman to go where she pleases, etc., as if conceding her right of choice between freedom and slavery. And indeed it would seem very strange if a slave temporarily present with her mistress in Pennsylvania, could, by the intervention of others against her own will be wrested from the possession of her mistress and forced by the law or its ministers to be free.

The bill makes no reference to any law or statute of Pennsylvania, but rests the claim to freedom merely on the fact that Maria was taken to Pennsylvania by Mrs. Kirby, and upon the proceedings on the writ of *habeas corpus*. It was agreed, however, upon the record in the Circuit Court, that the 10th section of the statute of Pennsylvania for the abolition of slavery, passed in 1780, and also a statute of 1847 repealing the exceptions contained in said 10th section should be considered as a part of the case. Neither of these statutes is actually copied into the record before us. Nor have we any other evidence of their contents than as stated in the arguments and briefs of counsel. From these we understand the 10th section of the act of 1780, as modified by that of 1847, to be as follows, viz:

“No man or woman, of any nation or color, except the Negroes or Mulattoes, who shall be registered

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as aforesaid, shall at any time hereafter be deemed, adjudged, or holden within the territories of this Commonwealth as slaves or servants for life, but as free men and free women."

It was doubtless under the authority of this act, and in reference to it, that the writ of *habeas corpus* was issued, and that Maria was discharged under it. And the question of her freedom has been argued on both sides; 1st, as it arises under the operation of the statute itself; and 2d, as it is affected by the proceedings and award or judgment on the writ of *habeas corpus*. It has not been made a question whether the statute of Pennsylvania should or should not have the same effect as if set out and relied on in the bill, and we suppose it was intended that it should have the same effect.

Then the first question is, what effect by the law of Kentucky is this statute of Pennsylvania to have upon the condition and rights of a slave voluntarily taken by the owner through or into the State of Pennsylvania, and there casually remaining three or four days, or a few hours, or one minute, but acknowledging servitude and the right of the owner during this commorancy, and returning to Kentucky as a slave? We put the question in this way because it has been argued that the statute operates instantaneously, and changes the condition of the slave just as soon as there is a voluntary entry by the owner with the slave within the territorial operation of the law; and because while we can distinguish between a removal to Pennsylvania, or an entry upon her limits for the purpose of residence, and an entry for a merely transient or temporary purpose, we cannot, in this last case, distinguish between a commorancy or delay of four days and one of four minutes. Nor indeed, if the statute is to have an instantaneous effect upon the condition of all persons coming within the limits of the State, do we perceive any ground for distinguishing between the case in which the owner voluntarily crosses the line of the State, and one in which he crosses it accidentally and ignorantly. Or if

ignorance of the boundary of the State should have the effect of repelling the operation of the statute, so should ignorance of the statute itself, which a foreigner is not presumed to know, have the same effect.

It may be admitted that Pennsylvania, except as restrained by the constitution of the United States, has a right to determine by her laws, what shall be the condition of all persons within her limits. But we do not admit that, as to strangers, this right exists any longer than while they are within her limits, or that on the ground of a transient entry, or momentary sojourn, upon her territory for a temporary and lawful purpose, a new and permanent condition or *status* can by her laws be stamped upon strangers so as that it shall adhere to them and determine their condition on their return to their own domicil. The doctrine of this Court, as heretofore declared, is that although by going into another State, even temporarily or transiently, a citizen subjects himself in fact to her laws, while there, he does not thereby assume the condition which they declare belongs to all persons, or to those of his class, but that upon his return he will be regarded as if he had not been absent, or as having carried with him and brought back the same condition and rights which belonged to him before by the laws of his own State. *Graham vs Strader*, (7 B. Monroe.) *Collins vs. America*, (9 B. Monroe.) This is the principle of the cases referred to as applicable to the condition of slaves as well as to the condition and rights of the master. And the Court has further maintained the principle to which we adhere, that the effect and operation of the foreign law upon the rights and the condition of his slave temporarily within its jurisdiction by the consent or act of his master, with no intention to change their relative condition, is to be determined in a contest between them in our own Courts by our own laws and not by the foreign law.

It remains, then, upon this part of the subject only to say, that the tenth section of the Pennsylvania stat-

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Though a State may have a right to declare the condition of all persons within her limits, the right only exists whilst that person remain there. She has not the power of giving a condition or status which will adhere to the person every where—but upon his return to the place of his domicil, he will occupy his former position if a slave, that of a slave, if hired as such before, and if sojourn in the other State was for a temporary purpose only: *Graham vs Strader*, (7 B. Mon. 635,) *Collins vs America*, (9 B. 565. And the effect of a removal into a free State of a slave who returns with or to his owner is to be determined by the law of Kentucky, not by the bonds of the State, where the slave may have been.

The 10 section of the Statute of Pennsylvania, of 1780, is in sub.

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stance like the ordinance of 1787. "That there shall be no slavery or involuntary servitude within her territory," but does not impart pardon to slaves temporarily with in their territory with their owner or their masters consent.

ute of 1780, stripped of its exceptions, is neither prohibitory nor vindictory, nor even declaratory of the consequence of any particular act or fact; but is merely declaratory of the general principle, that no person shall be adjudged or holden within that Commonwealth as a slave, but as free, that is all shall be held to be free. It does not differ in principle or substance from the declaration in the ordinance of 1787, "that there shall be neither slavery nor involuntary servitude in the said territory," which, in the cases referred to, was decided not to impart freedom to slaves temporarily within the territory, with their owners or by their consent. And it still more nearly resembles the first section of our own statute of 1798, (*Statute Law* 1471,) which enacts "that no persons shall henceforth be slaves within this Commonwealth, except such as were so on the seventeenth day of October, in the year one thousand seven hundred and eighty-five, and the descendents of the females of them." To say that persons of a certain description shall not be slaves, is fully equivalent to saying that they shall be free. And our statute is even more peremptory, and apparently more direct in its operation than that of Pennsylvania, since our statute declares positively that the persons not coming within the exception shall not be slaves within this Commonwealth, while the other only declares that no persons not registered, etc., shall be deemed adjudged or holden as slaves &c.

And yet, while it cannot be doubted that many persons who our statute declares shall not be slaves within this Commonwealth, have been brought into it as slaves, it has never been imagined that the statute, by its own force, emancipated them while temporally here, and much less that it made them free on their return to the domicils of their owners from which they were brought and to which they returned, or were taken back as slaves. Nor do we suppose that if a slave thus brought temporally within the State were to sue his owner for freedom on the ground, that by

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this statute he could not be held in slavery in Kentucky, any Court in this State would construe the statute as giving the right to freedom, or taking from the owner his right to the slave because he was here with him for a transient or temporary purpose. The construction would doubtless be, that the statute, though absolute and general in its terms, was intended to regulate the rights and acts of the citizens and residents, and not of transient visitors.

It is true, the Courts of Pennsylvania may have construed their statute differently. The Judge who acted upon this *habeas corpus* certainly did so; and it may be that the legislature of 1847, in repealing the exceptions contained in the original act, intended that the general declaration which remains should operate *ipso facto* and at once, to free every slave brought within the State, without regard to the occasion of his being brought, or the duration of his stay. But such a construction by the Courts, or such an intention on the part of the legislature does not seem to refer itself to any view of internal policy, but results apparently from a disregard or denial of rights of property established by our laws, and which, on principles of comity, should be at least passively respected in other States, so far as their exercise in those States would not disturb the peace and order of society, or violate its internal policy; it would, in effect, be yielding our own law to the foreign law, and giving to the foreign law an extra territorial operation which is denied to our own laws, and that, too, in a point involving essentially the interests of our own citizens, and the institutions of the State if we should allow to the law in question the instantaneous, absolute, and permanent effect contended for, on the ground either that the legislature or the Courts of Pennsylvania had declared that it should so operate.

If any State were to enact that any slave brought within its limits by the authority of the owner, and permitted by him to remain there six months, or three,

A statute of any non slaveholding State declaring that any slave brought into them.

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State, by his owner, though taken there for a temporary purpose only, should be instantly free, will not be enforced in Kentucky.

or even one, should be free, there might be some reason for saying that such a law should operate permanently, even upon the rights of strangers, because they would have an opportunity of knowing its provisions and avoiding its consequences. But a statute declaring that any slave so brought into the State should be instantly and absolutely free, would except, on the ground that there could be no rightful slavery, not only be harsh and inhospitable, but would be unreasonable and unjust as to strangers who, though ignorant of its terms would, while within the State, be subjected to the consequences of its infraction, without the possibility of avoiding them. We do not admit that these consequences, though expressly declared should be recognized and enforced by any other State against its own citizens who may ignorantly have incurred them. And, therefore, if we were bound to concede that the 10th section of the Pennsylvania act of 1780 was equivalent to an express declaration that every slave brought into that State should immediately be free, and although it would be certain that so long as the slave should remain in that State he would not be subject to the coercive authority of his owner, we still should not admit that the slave, voluntarily continuing his subjection and returning with his owner, or brought back from their temporary absence, could, under the laws of this State, successfully assert a right to freedom, because the statute of another State declared that any slave carried within its limits should be immediately free. On the contrary, we are of opinion that when after a temporary absence they are found here, at the place of their domicile, sustaining the same apparent relation of master and slave as before, our law will consider that relation as still legally subsisting, though they may have been in a State where it was prohibited or not recognized, unless it is shown, or may be inferred that there was an intention to emancipate, or to submit to the emancipation declared by the statute of such State.

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A slave taken to Pennsylvania by his owner, and there upon *habeas corpus* declined to be free with liberty to go where she pleased, came back to Kentucky, with her owner. Held that the decision of the judge in Pennsylvania, was ineffectual to show any right to freedom in a suit for that purpose brought in Kentucky, by the slave especially as she did not ask the suit in Pennsylvania.

What effect then is to be given to the proceedings on the writ of habeas corpus? We say it is entitled to none, and certainly to no conclusive effect upon the question whether Maria is or is not a slave by our laws. The only question presented by the petition and by the writ, was, whether Maria was illegally held in restraint by Mrs. Kirby or by Boyd, who was travelling with her. The response claimed that she was held by purchase in Kentucky as a slave for life, and thus referred the respondents title to the laws of Kentucky. As the response was not contradicted by any evidence, but was sustained by the admissions of Maria herself, the Judge, if he had considered the question whether she was a slave by the laws of Kentucky as decisive, or at all material in the case, must have assumed the affirmative. And if he decided this question at all, he decided it in that way, as is evident from his interrogatory to Maria. But it is manifest that he disregarded that question, and that he decided as to the illegality of the restraint complained of, solely upon the laws of Pennsylvania, of which none are relied on but the statute already referred to; from which it appears that in that State slavery is not recognized, and that all persons are there to be adjudged and holden as free. Then all that the Judge decided and all that the record of the proceeding conclusively proves, is, that Maria and Mrs. Kirby were in Pennsylvania, and before the Judge on the writ, that he considering the restraint upon Maria to be illegal according to the laws of that State, discharged her from it, and declared either that she was absolutely free, which would seem to have exceeded the limits and object of the proceeding, or that she was in that State free to go where she pleased, without coercion. But Maria did not ask for nor accept the benefit of this discharge, nor remain in Pennsylvania where it or the laws on which it was founded might have availed her, but remained in the custody and control of her mistress, and returned with her to Kentucky as her slave. And although it were conce-

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ded that the Judge decided right, according to the law of Pennsylvania, which disregards the law of Kentucky, and that by that law and the decision under it, Maria might have gone at large in Pennsylvania as a free woman; yet as she is here and appeals to our tribunals for the assertion of her freedom, the question still is, whether upon the facts appearing, she is free by the laws of this State. And we do not perceive how or why the conclusive proof by a record of the fact that she was in Pennsylvania with her mistress as a slave, and that by the law of that State the restraint was illegal, and she was entitled to go at large as a free woman, can have any other influence upon that question than the same facts would have if admitted or proved by oral evidence, and by the production of a statute accordant with the construction which the Judge seems to have placed upon that of 1780. And as such a statute would not, in our opinion operate of itself to make Maria free according to our laws, so neither can the proceedings upon the habeas corpus have that effect, and especially when the writ was not sued out at her instance, and she in effect refused and disclaimed the benefit of it.

A decision against the applicant upon one suit of *habeas corpus*, is no bar to another suit.

But in truth, the record and the proceedings which it states, are conclusive as to nothing except that such proceedings were had. If the decision had been against Maria, we assume that it certainly would not have been conclusive against her in Pennsylvania, but she might have obtained other writs, time after time, until she found a Judge who would decide the law in her favor. It would be strange then if it were conclusive against Mrs. Kirby whose rights were in fact not investigated nor decided, except to the extent that by the laws of Pennsylvania, her restraint of Maria was illegal. The decision is not conclusive here on another important principle, and that is, that Mrs. Kirby had not the benefit of those laws under which her right to Maria was acquired and sustained, and therefore in the trial in Pennsylvania, she had not the same

rights of trial to which she is entitled here, and from which, Maria could have precluded her, only by remaining in Pennsylvania, or by not coming to Kentucky. Besides, the parties are not the same. There was no regular litigation between Mrs. Kirby and Maria, and therefore no final determination of their respective rights. In fine there was nothing decided by the Judge, but that the slave became free by being brought into that State, and as the question is now to be decided by our laws, we say that according to our laws, the transitory ingress of Mrs. Kirby and her slave into the State of Pennsylvania did not make the slave absolutely free, notwithstanding the statute and the decision under it.

Wherefore the decree dismissing the bill is affirmed.

Kinkead & Breckinridge for appellant; *Pindell, Shey, and Beck* for appellee.

**SPRING &
STEPP
vs
BESORE, &c**

Spring & Stepp vs Besore, &c.

APPEAL FROM THE FAYETTE CIRCUIT.

Malicious suits. Probable cause.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

Spring & Stepp were in the year 1849, engaged in keeping a livery stable in the town of Richmond, and having incurred liabilities to a considerable extent, several of their creditors exhibited bills in chancery in the Madison Circuit Court against them, alleging that they intended to make a fraudulent conveyance or some other fraudulent disposition of their property, for the purpose of preventing their creditors from collecting

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January 26.

Case stated.

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their debts; on which bills, attachments were sued out and levied upon the property of the defendants.

The defendants answered and denied that they intended to make any fraudulent disposition of their property, or had ever entertained such a design. The suits were consolidated and a good deal of testimony introduced on both sides. Upon final hearing, the Circuit Court sustained the attachments, and the property attached having been sold during the pendency of the suits, distributed the proceeds among the several attaching creditors. To that decree the defendants prosecuted a writ of error, and this Court being of the opinion that the testimony was insufficient to establish the charge of a fraudulent intent, reversed the decree and remanded the cause with directions that the several bills should be dismissed.

After the reversal in this Court, but before its mandate had been entered and carried into effect in the Circuit Court, Spring & Stepp commenced two actions on the case in the Fayette Circuit Court against part of the creditors for having, as alleged in the declarations, maliciously, and without probable cause instituted said suits in chancery, and sued out the attachments therein, whereby their property had been levied upon, and sold at a great sacrifice, and they had sustained considerable loss and injury.

The two cases were consolidated and submitted to the Court by the consent of parties, to determine, first: Whether, as the suits were brought, before the mandate of this Court had been entered in the Madison Circuit Court, and the bills dismissed, they could be maintained, or should for that reason be abated? And second: Whether the decree in the Circuit Court sustaining the attachments and decreeing relief to the complainants, notwithstanding that it had been reversed, was conclusive, or only *prima facie* evidence of probable cause for instituting the suits and suing out the attachments? Both questions were decided against the plaintiffs by the Circuit Court.

In addition to the facts already mentioned, it was admitted by the parties, and so entered on the record, that the defendants were actual *bona fide* creditors of the plaintiff at the time they instituted the suits in chancery, and obtained the attachments; and that the Madison Circuit Court had jurisdiction over the subject matter of the suits. The proceedings in the chancery suits were to be considered as part of the agreed facts; but there was no admission that any other proof could be made to establish the want of probable cause, than that which might be deduced from the record of the proceedings in said suits, and the reversal, by this Court of the decree of the Circuit Court.

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1. It is a general principle, that to enable the plaintiff to maintain such an action as this, the suit alleged to have been malicious must have been determined in his favor; and this fact, as well as the manner of its determination, must appear on the face of the declaration. *Cole vs. Hanks*, (3 *Monroe* 209.) This principle is not controverted, but it is contended that the suits had been virtually determined by the reversal of the decree, and the mandate of this Court directed to the Circuit Court to dismiss the bills, and to sustain this proposition, we have been referred to the case of *Burt vs. Place*, (4 *Wend*, 501,) in which it appeared that the suits complained of as malicious, were instituted in a Justice's Court, and the plaintiff there recovered judgments, but the defendant brought appeals on them, and prevailed in the Common Pleas; and it was held by the Supreme Court of the State of New York, that the appeals *were further proceedings* in the same suits, and the judgments rendered in the Court of Common Pleas, were determinations of the suits in favor of the defendants. But there is an evident want of analogy between that case and this. In that, the judgment of the Court of Common Pleas produced a reversal of the judgment of the Justice, and was carried into effect by the Court that rendered it, being, as we may presume similar to appeals in this State, from

It is the general principle that to enable a plaintiff to maintain an action for a civil suit brought maliciously, the suit alleged to have been maliciously brought must have been determined in his favor, and the fact should be averred: *Cole vs. Hanks*, (3 *Mon.* 209.)

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A bill in chancery brought in the Circuit Court decree for complainant, reversed by the Court of Appeals with a mandate directing the Circuit Court to dismiss the bill, is not such a final adjudication and determination of the suit as will authorize the defendant to bring his action on the case for a malicious suit until the mandate is carried into effect.

the judgments of justices of the peace, to the Circuit Court, where the trial is had in the latter Court, and the judgment rendered and executed without any reference to the judgment appealed from.

In this, the further action of the Circuit Court was necessary to put an end to the suits, by carrying into effect the mandate of this Court, and until that was done, the suits were still pending and undetermined in that Court. There might be some plausibility in the argument, that in the case of a mere affirmance by this Court, the suit was determined before the mandate was entered in the Court below, because no change of judgment or decree would be produced, and also because, under the statute on the subject, no action of the Court below is necessary, except in some specified cases. But in the case of a reversal, even where the Circuit Court is imperatively required, by the mandate of this Court, to dismiss the complainant's bill, the suit is still pending in that Court until the requisition is complied with, and can in no sense be said to be actually determined, although the mode of its determination may have been unalterably fixed by the decision and mandate of this Court. It follows, therefore, that these suits were commenced prematurely, and cannot be maintained.

The effect however, to which the decree of the Circuit Court is entitled, notwithstanding its reversal, is a question of more importance, as upon its decision, the right of the plaintiffs to maintain a subsequent action essentially depends. Upon this question the authorities seem to conflict. The Supreme Court of North Carolina decided in the case of *Griffis vs Sellers*, (4 *Devereux and Battle*, 174,) that probable cause, was judicially ascertained by the judgment of the inferior Court, although upon an appeal, a contrary judgment be given in a higher Court; and that such a judgment, no matter how obtained, being a judicial sentence, is conclusive evidence of probable cause. The same doctrine was held substantially by the Supreme Court of Massachusetts in the case of *Whitley vs Peckham*, (15 *Mass.*

Rep., 243,) and in the case of *Herman vs Brookerhoof*, (8 *Watts' Pennsylvania Rep.*, 240,) it was decided, that "in a suit for a malicious prosecution, a judgment in the Court below is complete evidence of probable cause."

The case of *Reynolds vs Kennedy*, (1 *Wilson's Rep.*, 232,) settles, substantially, the same doctrine, that is, that the judgment of the inferior Court is complete evidence of probable cause, and indeed conclusive, if nothing else appear than the judgment, and its subsequent reversal. The case of *Burt vs Place*, *supra*, is however relied upon as settling a different doctrine upon the subject, and as deciding that such a judgment is not conclusive but only *prima facie* evidence of probable cause. The principle settled in the case last cited, we understand to be, that such a judgment will not, in every possible state of case, be deemed to be conclusive of the question of probable cause; but that, like judgments in other cases, its effect may be destroyed by showing that it was procured by fraud, or other undue means.

The correct doctrine on the subject is, in our opinion, that the decree or judgment in favor of the plaintiff, although it be afterwards reversed, is, in cases where the parties have appeared, and proof has been heard on both sides, conclusive evidence of probable cause, unless other matters be relied upon to impeach the judgment or decree, and to show that it was obtained by fraud: and in that case it is indispensable that such matter should be alleged in the plaintiff's declaration; for unless it be done, as the other facts which have to be stated, establish the existence of probable cause, the declaration is suicidal. The plaintiff's declaration will itself, always furnish evidence of probable cause when it states, as it must do, the proceedings that have taken place in the suit alleged to be malicious, and shows that a judgment or decree has been rendered against the plaintiff. To counteract the effect of the judgment or decree, and the legal deduction of probable cause, it is incumbent upon him to make it appear in his decla-

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No suit for maliciously prosecuting a civil suit can be maintained where the decision of the superior Court has been in favor of the defendant, though that decision be afterwards reversed by the Court of Appeals; unless it be averred and shown that the decision of the inferior Court was obtained through fraud or unfair means.

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ration that such judgment or decree was unfairly obtained, and was the result of acts of malice, fraud, and oppression, on the part of the defendant, designed and having the effect to deprive him of the opportunity and necessary means to have defeated the suit, and obtained a judgment in his favor. The declarations in these cases do not allege any facts tending to obviate or countervail the legal effect of the decrees that were rendered in the Circuit Court against the plaintiffs; nor is the existence of any such, admitted in the statement of the facts which were agreed by the parties. The naked case then is presented of suits against the defendants for the malicious and vexatious prosecution of certain suits in chancery with attachments against the plaintiffs, in which, decrees were pronounced in favor of the present defendants, which were reversed by this Court, with direction to the Circuit Court to dismiss their suits, without any proof of malice or the want of probable cause, except that which is furnished by the record of the proceedings in the chancery suits. Under such circumstances, the decrees rendered in the Circuit Court are conclusive evidence of probable cause, and the plaintiff's cannot maintain their actions.

Wherefore there being no error in the judgment of the Circuit Court, it is affirmed.

Carr & Atwood, and Kinhead & Breckinridge for appellants; *Burnam* for appellees.

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CHANCERY.

ERROR TO THE MADISON CIRCUIT.

Case 105.

Emancipation. Wills. Executors.

JUDGE MARSHALL delivered the opinion of the Court.

January 26.

THE will of Humphrey Tunstall, admitted to probate in February, 1850, contains among others, the following clause:

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"I emancipate and set free my several negroes here mentioned, say, Squire, Jack, &c., (naming seven,) provided they give the Madison County Court good and sufficient security for their maintenance and good behavior. And if they should fail to comply with the above requisition, I give them all to Humphrey T. Hill, son of Harrison and Patsey Hill, as slaves for life."

A testator made his will in these words: "I emancipate and set free my several negroes here mentioned, say Squire Jack, &c. (naming 7,) provided they give the Madison Co., Court good and sufficient security for their maintenance and good behavior, and if they should fail to comply with the above requisition: I give them all to Humphrey T. Hill, son of Harrison and Patsy Hill, as slaves for life," five of the slaves offered the security to the County Court in reasonable time, the executor refused to assent and the County Court refused to take the bond:—Held that the offer by the will was to the slaves collectively or individually—and that the County Court should have accepted the bond if the executor

At the April term, 1850, of the Madison County Court, five of the negroes emancipated by the foregoing clause, offered in that Court, to execute separate bonds with security as required by the will. And the record from that Court states, that, having heard the statement of one of the executors who refused to give his assent as required by the statute, the Court refused to permit the bond to be executed and to grant certificates of freedom. On the same day, the five negroes whose application had been thus refused, filed this bill in equity against the executors of Humphrey Tunstall, in which they state, in addition to the foregoing facts, that the testator was not indebted to the amount of \$100, and left a large estate in lands and personalty worth thousands of dollars, and that the executors are in fact willing for them to be free, and they pray for general relief, and offer to execute proper bonds.

The executors do not controvert any of the facts alleged in the bill, but in effect admit them, and say they

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assented, and
that the execu-
tor ought to have
assented.

neither assented or dissented in the County Court, but that they withheld their assent on account of the short period which had elapsed from the testator's death, and not being fully acquainted with his affairs, they were unwilling to incur responsibility by immediate and absolute assent, and because they had in fact taken no control over the complainants, but had let them go about as free persons.

H. T. Hill, the contingent devisee under the clause of the will above quoted, and otherwise the principal devisee in the will, was made a defendant on his petition, and after filing a demurrer, which was overruled, contested by answer and cross bill, the right of the complainants to any relief, on the ground that they had not complied with the condition prescribed for their emancipation, and insisting that bond had not been tendered in proper time, nor with good security; that all the seven were required by the will to give bond so as to bind all for each, or at least that all must give bond, and that if this were not done, all were devised to him. He also insists that he is entitled to the hire of the seven from the death of the testator, and prays for a decree against the executors, &c.

The Chancellor having in an interlocutory decree expressed the opinion that the County Court should have allowed the complainants to execute bonds, &c., that their rights could not be prejudiced by the improper refusal of their offer, but that in equity the offer made in good faith vested the right of freedom, subject still to the condition of executing the bonds as required, time was given until the next term for the complainants to execute their bonds with security, &c., in the Court of equity, or to produce evidence of their having done so in the County Court. In either of which alternatives it was intimated that such further decree would be rendered as might be necessary for effectuating their freedom before the next term the County Court, acting in conformity with this decree, and as it would seem, under the idea that it was mandatory upon them, ac-

cepted bonds executed by the complainants with security, &c. And at the March term, 1851, it was finally decreed in this case that the complainants have their freedom that the cross bill of H. T. Hill be dismissed and that he pay to the complainants, their costs, &c.

Upon the emancipating clause in the will, we are of opinion that freedom is given to the slaves severally, and that each one upon compliance with the condition prescribed, is free as far as the testator could make him so. He emancipates the several negroes named upon their executing bond. Looking to the nature of the right or benefit conferred, and to the language used, the obvious meaning is, that he emancipates each and any one upon the performance of the condition as applicable to each and any one. The word 'their,' and other similar words, are often used in this manner to avoid circumlocution, and it is therefore often necessary to construe such words distributively. Of this, the statute of descents presents numerous examples. The concluding words of the emancipating clause are not sufficient to change this construction of the first part. Even if the word "they" in the latter part of the clause means "all of them," this would merely show that H. T. Hill was to have all, only in case they should all fail to comply with the requisition, which would not be at all inconsistent with the devise of freedom to each, upon his or her compliance.

It is not requisite that the seven negroes named in the clause should be bound for each other, or that each should become free, in order that any one might be free. And that the complainants offered to execute bonds without unreasonable delay, is manifest not only from the fact that a very short interval had elapsed after the probate, within which they were to look about for security, but also from the fact that the executors were not ready even when the offer was made, to determine whether they would assent to the emancipation. But it now appears that they ought to have assented. They admit that the other estate of the

Where the executor improperly refuses to give his assent in the County Court to the freedom of a slave emancipated by will, the chancellor has jurisdiction to coerce the requisite assent.

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testator, besides the seven negroes conditionally emancipated, was, and is, amply sufficient to pay his debts. They show no reason why they should not assent to the emancipation as directed by the will. And they do, by their answer virtually assent. Then, as under the act of 1841, (3 *Statute Law* 226,) it was not the duty of the County Court to accept the bonds and grant certificates of emancipation without the assent of the executors, which was withheld, and as the same statute expressly authorizes a bill in chancery by slaves emancipated, to coerce the assent of the executors when improperly withheld, the Court of Equity had undoubted jurisdiction of this case for that purpose, if for no other. And although the bill does not specifically pray for such coercion, yet, as it shows sufficient ground for it, and prays for general relief, there is enough to sustain the jurisdiction of the Court, and the demurrer, was properly overruled.

The right to freedom exists from the date of the valid offer to execute the requested bond in such case.

The sufficiency of the security offered by the complainants in the first instance, and which was denied by the answer of Hill, was material in this case only for the purpose of showing that there had been a sufficient as well as timely offer to comply with the condition prescribed by the will. As this was satisfactorily established by the evidence, the offer, though not accepted at the time, and therefore not making them absolutely free, must be regarded as a complete tender of performance on their part; and as they proceeded without delay, and in a legal manner to consummate their rights by coercing or procuring an acceptance of their offer, and thus actually performing the condition, we are of opinion that the entire proceeding and the final performance of the condition by the execution of bonds accepted by the County Court, relate back to the valid offer of performance originally tendered, and have the same effect in vesting and completing the right to freedom as if the performance tendered had been at once executed and accepted.

The County Court having accepted the secu-

It is unnecessary to decide whether, if the County Court had not accepted the bonds during the progress of the suit, the Court of Equity could have granted any other relief than that of coercing the assent of the executors, or of decreeing that their answer contained a sufficient assent, and thus removing the obstruction to the action of the County Court. Nor is it material to enquire under what motives this last named Court accepted the bonds. The answer of the executors and the interlocutory decree, constituted proper grounds for their accepting sufficient bonds and granting certificates of freedom. And if they supposed the decree to be compulsory, this mistake does not vitiate their act. The execution and acceptance of the bonds in the County Court completed the performance of the condition imposed by the will, and entitled the complainants absolutely to their freedom.

The County Court having accepted the bonds, a decree declaring as the consequence, that the complainants have their freedom seems to have been an appropriate termination of their suit. And even if the decree imports more than the mere declaration of a fact, it can prejudice no one.

With regard to the claim of H. T. Hill to the hire of the complainants from the death of the testator, it is sufficient to say that the statute of 1841, although it requires the executors to hire out slaves emancipated by will until they are satisfied that there is other estate sufficient to pay the debts, etc., expressly enacts what would be otherwise the dictate of equity that the hire shall be for the benefit of the emancipated slave, if the executor becomes satisfied that the other estate is sufficient. So that Hill, on this ground as well as because he is not entitled to the complainants, has no right to charge the executors with hire for the time that they permitted the complainants to go free, or for the time that they were hired out under the order of the Court, and certainly cannot complain, as he has done in this Court, that the decree makes no disposition of this hire, ex-

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rity and taken the proper bond in conformity with an interlocutory thence in the case the freedom of the complainant is completed.

Where slaves emancipated by will are hired out until the executor assent to freedom, the hire is for the benefit of the emancipated upon its consumation.

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cept for payment of fees, etc. As Hill is the only party who opposed the relief sought by the complainants, and as he has failed in every ground assumed for this opposition, and also in every claim set up in his cross bill, it was certainly right to decree against him all the cost of the complainants in their contest with him; and he might have been decreed to pay costs of the executors on his cross bill, which was not done. The complainants, however, incurred a small amount of costs before Hill became a party, and as it does not appear that he had any agency in defeating their original attempt to comply with the condition of their emancipation, he should not be made liable for the costs incurred in the suit against the executors before he came into it. But for all costs subsequently incurred by the complainants, both in their original bill and on his cross bill, he is justly liable.

Wherefore the decree, except as to the costs, is affirmed, but so far as respects the costs, the decree is reversed, and the cause remanded with directions to decree the costs as above indicated. And in this Court the defendants in error are entitled to one-half of their costs.

Field, Runyan, and Burnam for plaintiff, *Turner* for defendants.

Bohannon vs Combs.*Case.***ERROR TO THE WOODFORD CIRCUIT.***Case 106.**Bills of Exchange. Sureties.*

JUDGE MARSHALL delivered the opinion of the Court near the close of the last term, when it was suspended until the present term.

*October, 18.**Case stated.*

COMBS, as the holder of a bill of exchange due in January, 1839, drawn by Divine, accepted by Brown the drawee, and endorsed by Bohannon the payee, and also by Huggins, having obtained on it a judgment against the acceptor Brown, a bill was filed in the names of Brown, Divine, Bohannon, and Huggins, praying to enjoin the judgment, and also to restrain and enjoin Combs from further proceeding on the bill of exchange, and that it might be cancelled. An order was endorsed on this bill by two Justices authorized to award writs of injunction, &c., directing the clerk to issue an injunction according to the prayer of the bill, upon the complainant's entering into bond with good security in the penalty of \$2200, conditioned according to law, and upon their entering on the bill a release of errors, &c. Under this order a bond was executed for the sum of \$2200, naming as obligors all the parties named as complainants in the bill, and also Benjamin Bailey, and the condition of which, recites that Combs had obtained a judgment against Brown, (at the March term, 1839,) for \$1,271.67 with interest and costs, upon which, Divine, Brown, Huggins, and Bohannon, had filed a bill enjoining the collection thereof, which injunction was granted upon their executing this bond with Benjamin Bailey as their security, and concludes. Now, if said Divine, etc., shall pay to said Combs all money or tobacco and costs due, or to become due to him in said action at law, and all such costs as shall be awarded against them in case said in-

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junction shall be dissolved, then the bond to be void, etc.

This bond, dated 26th day of June, 1838, was executed by Brown, Divine, and Bailey alone. And the injunction, as endorsed on the subpoena, which issued on the 27th of June, 1838, restrained and enjoined Combs and the Sheriff from collecting the judgment and execution in the bill mentioned, stating that bond was executed as required, but said nothing about the bill of exchange. The injunction, after some years, was dissolved, and in September, 1847, Combs, in an action on the injunction bond against Bailey alone recovered a judgment for \$1,607.35, with interest from that date, and costs which, amounting in all to \$1,617.68. Bailly shortly after replevied for three months, with Graves as his surety. In February, 1848, Combs commenced the present action upon the bill of exchange against Bohannon as endorser; and as it appears, though not so stated in the declaration or process, for the benefit of Bailey, and to indemnify him for or against his obligation to pay the replevy bond, to which alone Combs looks and adheres for his own security and payment. Combs disclosed this fact in answer to a bill of discovery filed by Bohannon, and states that the arrangements was made with Bailly in consideration of his agreeing to throw no further obstacle in the way of collecting the money.

The defendant, Bohannon, filed numerous pleas to the action against him; and among other pleas, No. 2, which relied upon the lapse of more than five years from the accrual of the cause of action before the commencement of this suit. To this the plaintiff replied, that long before five years had elapsed, etc., the defendant filed his bill and obtained from two justices, etc., an injunction restraining and enjoining the plaintiff from further proceedings on the bill, and executed bond, and said injunction was served on the plaintiff, and remained in force until, etc., as will be seen by the record, etc., and that five years had not elapsed, including the time for which the injunction remained ex-

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force. A demurrer craving oyer of the record, and denying the sufficiency of this replication, and of the record therein referred to, to avoid the bar, was overruled, and the propriety of this decision is the first question to be considered.

The question presented by these pleadings is whether there ever was, in fact, any injunction which prevented or restrained Combs from bringing an action on the bill against the drawer or endorser. It is indeed contended that if there had been an express injunction to this effect, it would not prevent the running of time in bar of an action, because the pendency of an injunction is not one of the causes mentioned in the 6th section of the act of limitations, (*Statute Law 1137*), nor one of the obstructions referred to in the 9th section, (*Page 1139*), the existence of which may save the plaintiff from the running of the statute. But although an injunction is not named, nor literally described in the statute, yet, when it is resorted to by the party liable to the action, for the very purpose of preventing or obstructing it, and does, in fact, if effectual according to its terms, prevent its being commenced; we are inclined to the opinion that it comes within the reason and spirit of the saving clause of the 9th section. And if the party enjoined might obtain such a modification of the injunction as would permit him, contrary to its express mandate, and against the apparent equity of the case, to commence his action for the purpose of avoiding the bar by time, it would seem that the party who has obtained the injunction forbidding him to sue, has no right to require him to seek such relief against it, and cannot with propriety be allowed to claim advantage from his obeying the injunction, until he shall, by showing that it was inequitable and should not be retained, obtain a dissolution of it.

But it is not necessary to decide whether the time during the pendency of an injunction which prohibits the bringing of an action, may be relied on in making out the bar by limitation against the action commenced

Will the obtaining an injunction by a party, prevent the running of the statute of limitations within the meaning and intention of the proviso of the 9 section of the act of 1795: (*Stat. Laws 1137*).

An injunction enjoining a judgment at law against the acceptor of a bill of exchange, is

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not an injunction
to a suit against
drawers and in-
orders.

after the injunction is regularly dissolved, and we do not decide the question. However this may be, we are satisfied that there was in this case no restraint or injunction, except as to further proceedings on the judgment against Brown, the acceptor of the bill of exchange. The order of the justices did not profess to impose by its own force and unconditionally, any restraint whatever upon Combs, either in the collection of his judgment, or in proceeding upon the bill, and they had no authority to impose such restraint. They were authorized by the 2d section of the act of 1818, (*Stat. Law* 813,) to award writs of injunction, and the 3d section directs the Clerk to issue the writs of injunction so awarded. By the act of 1796, (*Stat. Laws* 809,) and by the general law the party obtaining an injunction is required to execute bond, &c., and by the act of 1827, (*Stat. Law* 815,) the clerk is to approve of the security. He is of course to take the bond. The order of the justices in this case conformed to their authority, and merely directed the clerk to issue a *writ of injunction* according to the prayer of the bill upon the complainants executing bond, &c., according to law. By its own terms it was conditional; there was not, and could not be any injunction under that order, until a bond was executed according to its mandate, and with the approval of the clerk, of which the proper evidence should be the writ of injunction, or as is commonly practised, the subpœna with an injunction endorsed upon it. And even if a writ of injunction or an endorsement on the subpœna was not indispensable to the existence of an injunction, certainly the execution of a bond according to law, or intended to be so, being required both by the law and the order was absolutely essential to any effectual injunction. But an injunction against further proceedings on the judgment, and an injunction against proceeding on the bill of exchange are substantially different, and a bond suitable for the one is not suitable to the other. And certainly a bond securing merely the judgment enjoined, with

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costs and damages, reciting that injunction alone, referring to no other, and not pretending to secure any damages which might accrue from any other injunction, could not under the terms of the order, authorize or give effect to any injunction, except against the judgment. If the order was intended to authorize an injunction to the extent of both prayers of the bill on the execution of bond according to law, the condition has been but partially complied with, and if there might be an injunction to the extent to which the condition has been complied with, there could not legally be one to any greater extent. If the Clerk, supposing the bond which he took to be a full compliance with the order, and a full authority to issue an injunction against the bill, as well as against the judgment, had accordingly issued an injunction against both, it would, in fact, have been unauthorized, except as to the judgment. And if it was binding at all to any greater extent, it might, so far at least as it related to the bill, have been discharged or quashed for want of a bond. But whether the Clerk mistook the extent of the order, and therefore took a bond for an injunction against the judgment only, or whether the parties did not desire to avail themselves of the order to any greater extent, and therefore executed the bond for enjoining the judgment only, it is evident that there was not only no bond authorizing an injunction against proceeding on the bill, but that there was neither a writ, nor an endorsement enjoining such proceeding. And as the order of the justices was not itself an injunction, there was neither in form nor in fact any restraint or injunction preventing the commencement and prosecution of any remedy which Combs might have chosen to institute against the drawer or endorsers of the bill. The record, therefore, does not sustain the averment of the replication, and is not such as it is therein stated to be. This discrepancy might, perhaps, have been more properly the subject of a rejoinder denying that there was such record, etc. But as the

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record is in fact brought before the Court, the question as to its effect is sufficiently presented by the demurrer which was improperly overruled.

As to this error, the judgment must be reversed. We shall notice other proceedings in the case, only so far as may seem necessary for regulating the future progress of the suit, should the plaintiff file a sufficient replication to the second plea.

The first plea presented the general issue only, which was joined.

Plea No. 3, relied upon the facts that Combs had obtained judgment against the acceptor, Brown, which Brown had enjoined with Bailey as his surity, that judgment had been obtained on the injunction bond against Bailey who had replevied it with Graves as his surity, that Bailey had compromised the debt with Combs by payment, or in some other way, in satisfaction and discharge of said bond, and that this suit is brought for the benefit of Bailey to enable him to indemnify himself out of said defendant as endorser, etc.

Plea No. 4 sets forth the same facts in more general terms, and avers that the judgment secured by replevin bond has been satisfied by arrangement between the plaintiff and Bailey.

Plea No. 5, after stating the preliminary facts as in plea No. 3, avers that since the execution of the replevy bond, and before the commencement of this suit Baily has, upon some consideration, procured the transfer from Combs to himself of the defendant's supposed liability on his said endorsement, and that in pursuance of said agreement and transfer, Baily is prosecuting this suit as an indemnity against his own liability on the replevy bond, and as a means of discharging the same. etc.

The 5th plea was adjudged bad on demurrer. The replication to the fourth plea denied that the bond was, or judgment had been satisfied, etc. To the third plea the plaintiff replied that the defendant filed his bill and obtained an injunction against further proceeding on

the bill of exchange, that Baily was his security in the injunction bond executed therefor, that the injunction was afterwards dissolved and the bill dismissed, and he obtained judgment on the bond against Baily, who replevied the same with Graves as surety, all of which it says is verified by the record, that the plaintiff did agree on a valuable consideration to permit said Bailey to use his name in a suit on said bill of exchange against the defendant, and that said replevy bond has not been satisfied and discharged by any agreement between plaintiff and Baily. To this the plaintiff rejoined that he did not obtain an injunction, and that no injunction did in fact issue restraining Combs from suing the defendant on the bill of exchange, that the plaintiff, for a valuable consideration, did permit Bailey, the security in the injunction and replevy bond, to prosecute this suit for his benefit on the bill, after the judgment thereon had been satisfied by the replevy bond, and concludes to the country.

The plea No. 6, which was adjudged insufficient on demurrer, is not in the record. But at the term after the preceding pleas had been before the Court, the defendant offered pleas No. 7, 8, 9, and 10, which were rejected, and at a subsequent term he filed a plea marked xx, to which the plaintiff replied, and assue was joined thereon. This last plea, after stating the preliminary facts as in the third plea, avers that since the 13th day of September, 1848, (the day on which Combs filed his answer to the bill of discovery herein,) said Bailey has compromised and arranged the debt by the payment of money, or in some other way, in satisfaction and discharge of said bond, thereby fully satisfying said bill of exchange, and that this suit was instituted in the name of Combs, for the benefit of Baily and for his indemnity, etc., The replication merely denies that Bailey, by the payment of money, or in any other way, ever satisfied or discharged the replevy bond, and concludes to the country.

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A bill of discovery of matter of defence set out in a plea filed, offered on filing the plea should be allowed, if the matter be material and can only be shown by the admission of the defendant.

On the day on which this plea (xx) was filed, and the issue made upon it, the defendant offered a second bill of discovery, calling upon Combs and Bailey, to answer as to the alleged satisfaction of the replevy bond, on the ground that he could not otherwise prove it, and asking for an injunction or a continuance until the bill should be answered, offering to execute any bond which might be required. But the Court refused both an injunction and a continuance, to which the defendant excepted, and the bill was not answered. As the fact sought to be discovered was the only one in issue under the last plea, and the bill of discovery was offered immediately after the issue was made up, we do not perceive on what ground the discovery and continuance should have been refused, unless because the bill was not sworn to. As the fact was alleged to have occurred since the answer to the former bill of discovery, denying payment or satisfaction of the bond, the discovery was not precluded by the former bill or answer; and it is evident that the fact alleged and sought to be discovered, was deemed material by the Court, as well as by the parties. The discovery, if necessary, may still be had.

The fact that the matter pleaded occurred after the commencement of the suit, and consequently operated only as a bar to further prosecution did not prevent its being plead with other pleas and without any effect upon them: (9 *Dana*, 182.)

Passing by this refusal as a matter not very important in the present attitude of the case, we observe that the only material difference between the third plea and the last one filed by the defendant, consisted in the fact that the former avers that the replevy bond was paid or satisfied, before the commencement of the suit, to which the plea must be understood to refer and the latter alleges its payment or satisfaction, during the pendency of the action. This last plea does not appear to have been presented or treated as a plea, *puis daries* continuance, and as there is no suggestion in this Court, that it should be so treated here, we do not feel called upon, to decide, that it should be strictly so considered, or that if so considered, it should have the effect of superseding or waiving all prior pleas and issues, and of placing the fate of the cause upon this

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plea alone. For all that appears in the plea the new fact relied on, though it happened after the commencement of the suit, may have occurred before any issue was joined and been a matter not within the personal cognizance of the defendant, it would seem that he ought to be allowed to plead it when discovered without incurring any disadvantage and especially without losing thereby the benefit of his previous pleadings.

The mere circumstance that the fact pleaded occurred after the commencement of the suit, and could therefore operate as a bar only to its further maintenance, did not, as decided in *Clark vs Fox*, (9 Dana, 193,) prevent its being pleaded with other pleas filed by the defendant, and without having any effect upon them. And as there was certainly a sufficient reason for not having pleaded it then, the plea when afterwards offered may be regarded as coming, like other pleas subsequently offered, within the discretion of the Court; and when allowed to be filed without opposition on condition it should operate as an ordinary plea, according to its own merits, and especially when it seems to have been considered on that footing by the parties and the Court. This conclusion accords, as we suppose, with the common practice in this State. We therefore consider the defendant as being entitled to the benefit of all his pleadings and demurrers, and as going into the trial on the issues formed under the first, third, fourth, and last plea; the jury having been in fact sworn to try the issues joined.

On the trial, the plaintiff made out a *prima facie* case under the general issue and read the record of the suit in chancery, enjoining the judgment against Brown, and of the suit of Huggins, consolidated with it. The defendant besides reading the two common law records, above referred to, and the first bill of discovery with the answer thereto, introduced evidence (as the bill of exceptions states,) conducing to show that the replevy bond had been fully paid off and discharged by Bailly to Combs, as an ordinary and unqualified

Matters existing but not discovered when pleas are filed may be pleaded afterwards in the discretion of the Court.

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payment, and the plaintiff introduced testimony conducing to show that the said bond had not been paid off and discharged, but that an arrangement had been made between Combs and Bailey, whereby Baily, advanced to Combs, the amount of said bond, not as a payment but simply as an advance upon the understanding or agreement that the same was not to be considered as a discharge of the bond, but that the said bond was to remain in full force and effect, as unpaid, and Bailey was to have the right of suing Bohannon, upon the bill for his own use and indemnity. The defendant offered to prove by Bailey himself, who seems to have been examined as a witness that he was the security of Divine and Brown, only, in the injunction bond, that they procured him to go security therein, Huggins and Bohannon having nothing to do therewith in any way or in the conduct and management of the chancery suit of Brown and Divine against Combs, but that Bohannon's name was inserted by Brown and Divine. But objection being made, the Court refused to admit the proof, to which the defendant excepted.

A surety of an acceptor of a bill of exchange in a replevy bond or injunction bond (given to stay the judgment against the acceptor,) who pays off the debt has no claim for remuneration against an indorser of the bill.

If the trial had been upon the issue taken under the last plea alone, the proof thus rejected would have been unnecessary, because that plea avers that Brown enjoined the judgment against him, and that Bailey was his surety in the injunction bond, and this fact not having been denied by the replication was admitted, and could not have been controverted on the trial of that issue, which left nothing to be decided by the jury but the question of fact whether Bailey had discharged or satisfied the replevy bond. But the fact itself is one of fundamental importance to the defense. For if Bailey was the security of Brown, the acceptor alone, he could not by paying the injunction bond or the replevy bond taken in the course of the remedy by the holder of the bill against Brown, acquire any rights against the other parties to the bill, to whom his principal was liable as the principal and ultimate debtor; and if he was the surety of Brown and Divine alone,

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in the injunction bond, he could not by discharging the judgment on it or the replevy bond taken under it, acquire any right against Bohannon, to whom both of his principals were liable on the bill. Whatever inference might be drawn as to the fact from the record which showed that Bohannon, was a co-complainant in the bill praying for an injunction, the record was not conclusive if it could have been relied on as an estoppel, and the true state of the fact was open to proof to be weighed by the jury. If Bailey was the surety of Bohannon as well as of Brown, or if he was co-surety with Bohannon for Brown, he might have acquired some right against Bohannon by paying the replevy bond, so far as Bohannon was bound to him as principal or as co-surety in the injunction. But while it is doubtful whether even on this ground, an action on the bill of exchange could be maintained for his indemnity after he had satisfied the holder of the bill, even against a party on whom he might call for indemnity, we are certain that it could not be maintained in the name of the former holder after he had received from the acceptor or his surety, or from the surety of the acceptor and drawer, satisfaction either of the injunction bond or of the replevy bond, for the purpose of indemnifying the person making the payment, by a recovery against a party who was under no obligation to him, but who was entitled to look both to the acceptor and the drawer, and to their surety in the remedy against them, for his own indemnity. The evidence relating to the satisfaction of the replevy bond by Bailey, does not fix the date of the transaction after the commencement of this action, and as it might have been important to prove the fact as to the suretyship, under the 3d and 4th plea, or under the general issue, the rejection of the evidence offered is deemed erroneous to the prejudice of the defendant. It is only on the ground that the arrangement between Combs and Bailey, relied on as a payment or satisfaction of the replevy bond, might not on account of its date be avail-

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able under the last plea but might be available under one of the others, that the evidence now under notice was important, and it is only upon the same ground that the other special pleas could be deemed material after issue taken on the plea marked (xx.) which contains the same facts, except as to the time of the alleged payment.

In reference to the arrangement relied on as a satisfaction of the replevy bond and of the bill of exchange, the Court instructed the jury "that if Bailey and Combs, agreed that Bailey, should advance to Combs a sum equal to the amount due on the replevy bond, that the bond should not be entered or be considered satisfied thereby, but should be considered as in full force until final adjustment to await the issue of a suit to be brought against Bohannon, for the use of Bailey, this was not a satisfaction of the bond or a merger of the bill of exchange, and was such an arrangement as it was legal and proper for them to make "

This instruction either assumes that Bailey was the surety of Bohannon, which is contrary to the admission plainly implied in the replication to the last plea, and which we think the Court had no right to assume as being conclusively proved by the records in evidence, or it assumes that it was immaterial whether he was the surety of Bohannon or not. Although Bohannon's name appears as a co-complainant in the bill praying for the injunction, it may have been placed there without his knowledge or consent; and, as no injunction was in fact obtained against further proceedings on the bill of exchange and no bond was executed for that purpose, as Bohannon did not execute the bond of Brown and Divine, under which the judgment against Brown was enjoined, and as that injunction stayed an execution which had been levied on Brown's property, and thus prevented the probable discharge by him of his own debt, the record does not conclusively show that Bohannon did in fact, concur in filing the bill, and that Bailey was the security of Bohannon, as well as of

Brown and Divine alone, for whose debt the records referred to show that the bill of exchange was made, and who alone executed the injunction bond as principals. It would seem probable too, that if Bailey, had not regarded them alone as his principal and rested on their responsibility, he would have required others to execute the bond in that character, so as to show with certainty, for whom he was surety.

The instruction can only be maintained upon the ground that even though Bailey was not the surety of Bohannan, but of Brown alone, or of Brown and Divine alone, he might, by advancing the amount of the bond which secured the bill, purchase the bill or the beneficial interest in it from Combs, the holder, and use his name in an action against an endorser to whom each of his principals was liable, as a means of reimbursing the sum which he had paid for it; and that the bill might be kept alive for that purpose by the mere agreement of Combs and Bailey, that the bond of the latter, taken in the course of the remedy upon the bill against the acceptor, should not be considered as discharged by the advance from Bailey the obligor, to Combs the obligee, of the precise amount due upon it without any other consideration but his liability as obligor in the bond, and the beneficial interest in the suit to be acquired by the advance. A slight analysis of this agreement as stated in the instruction, and as presented in the evidence of the plaintiff, will show that it was in substance and in fact a payment on the bond, and that whatever, for the purpose of sustaining this suit, the parties may have said, it must, whenever they should come to a settlement, have operated even as between them, as a payment of so much on the bond. By the agreement as stated in the instruction, the bond was to be considered as in full force, until final adjustment, to await the issue of this suit for the benefit of Bailey, and such is the import of the plaintiff's evidence. But how the advance was to be effected by the result of the suit is left to implication. Sup-

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pose the suit should fail, and Bailey should thus lose his indemnity, would he have the right to reclaim the advance, and throw Combs upon the replevy bond for satisfaction, or in the adjustment then to take place, was the advance to be considered as a payment on the bond? Or suppose the suit should result favorably, and thus furnish an indemnity to Bailey, would Combs be bound to pay back the advance, and look for payment of his own demand to what should be recovered in this action, or would the advance then be considered a payment of the bond, and Bailey look to the fruits of the action for his indemnity? It is not proved, and cannot be implied, that Combs was, by the agreement, to pay back the advance in any event of the suit. It cannot be presumed that Bailey made a present to his creditors of the precise amount of the debt, expecting or intending that the same amount should again be coerced on the bond, or that he paid this amount for the mere chance of the desired indemnity, with the understanding that the bond should be enforced against him, though the action on the bill for his benefit should fail, or that he intended to be subject to coercion on the bond, after Combs had received the full amount of it from him. We cannot regard the arrangement as amounting to anything else than that the advance should ultimately be regarded as a payment, but that it should not be so considered until the termination of this action. It was, in substance and in fact, a payment, but the credit for it was not to be entered during the pendency of this suit, and thus the bond was to remain in force, but it was not to be enforced because the amount due on it had been advanced by the obligor to the obligee, upon no other consideration but the bond itself, and the right to prosecute the suit.

Now, it need not be denied that these parties might lawfully agree that this advance should not be considered as payment until a certain period or event. But the question is, how other parties are to be affected by such an agreement? Suppose the acceptor him-

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self had advanced to Combs the amount due on the bill, on no other consideration but his own liability and the permission to use the name of Combs in an action on the bill against an endorser, for the indemnity of himself, the acceptor; could they change the nature and effect of the transaction, and invert the liability of the parties to the bill by merely saying that the bill should not be considered as paid, but should remain in force until the action should be tried? This would be an apparent absurdity. For the acceptor being bound to all the other parties for payment of the bill, and being, in effect, the principle debtor for whom the drawer and endorsers are surities, he cannot acquire any rights against them upon the bill, and any interest which he may acquire in it incurs to their benefit. Any arrangement between him and the holder which discharges him as acceptor, discharges also the other parties, and the holder and acceptor cannot, by their agreement, convert the responsibility of the endorser to the holder into a means of indemnifying the acceptor for his responsibility or for his payment as such. He cannot, therefore, by any advance upon the bill, acquire a right to use it against any of the other parties.

Has the surety of the acceptor, in a bond executed in the course of the remedy against him upon the bill, and which is a security for the bill, and includes it, any greater right as against the other parties to the bill than he himself has? Or can he, by any merit of his own obligation, acquire a right against any prior surity of his principal? The case of *Patterson vs Pope*, (5, Dana, 241)—approved in *Kouns vs Bank of Kentucky*—2, B. Monroe,) and the cases therein cited show that such a surity is considered as looking to his principal and his principal's property alone; and that, although by payment he may have a right to be substituted to the remedies of the creditor against the principal and his property, he has no right to be substituted to his remedies against the prior surities of the same principal for the same debt; but that they are dis-

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charged by payment of the debt, either by their principal or his surity coming in aid of him in the course of the remedy against him, and that they, if compelled to pay the debt, may be substituted to the rights of the creditor, -or against such subsequent surety. The case of *Parsons vs Briddock*, referred to in the cases just cited, is an exemplification of this principle as well as an authority for it; and it is amply sustained by principal and authority. Upon this principal, if Bohannon had been or should be compelled to pay his bill, he might be substituted to the remedy of Combs upon the replevy bond of Bailey. As he would have a right to indemnity from Bailey for payment of the bill, it is impossible that Bailey should, by paying it, acquire a right to indemnity against him. And so, as Bohannon would have a right, on making payment to the benefit of Bailey's bond, Combs has no right by arrangement with Bailey, to deprive him of that benefit, and cannot, in consideration of payment by Bailey upon his bond, which, in effect is payment of the bill by or for the acceptor, invest Bailey any more than he could invest the acceptor himself with a right to indemnity against Bohannon as endorser of the bill.

Assuming, then, that Bailey was the surity of Brown or of Brown and Divine, we regard him as occupying, so far as the present question is concerned, precisely the same attitude with respect to Bohannon that his principals would do. And we are satisfied that he and Combs had no right by merely agreeing to suspend the credit of the advance made on account of the replevy bond, or by agreeing that it should be considered as remaining in force, when it was obviously not to be enforced, make that which was substantially a payment, not to be a payment, for the purpose or with the effect of sustaining this action for the indemnity of Bailey, who would not be entitled to such indemnity by a formal and acknowledged judgment. And even if this advance was not a payment, still as it was the

exact amount of the bond which included the bill placed in the hands of Combs by the party to whom Bohannon has a right to look for indemnity, the effect is the same. It is a full indemnity to Combs in actual money for the amount of the bill, and Bohannon is entitled to the benefit of that indemnity as a protection against the present demand whether asserted for the benefit of Combs or of Bailey claiming under him, but who is bound to indemnify Bohannon.

The instruction, therefore, is erroneous to the prejudice of Bohannon.

Much of the reasoning used in considering the instruction just noticed, applies also to the question arising on the demurrer to the 5th plea. But although we are satisfied that an action on the bill ought not to be maintained against an endorser for the indemnity of the acceptor or his surety, even before payment of the bill by one of them, we are not satisfied that the mere agreement of Combs, even for a valuable consideration, that Bailey might sue for his own indemnity in the name of Combs, vests such an interest in the other party as actually extinguishes or discharges the bill so as to bar this action which, though brought and carried on under the arrangement may, for all that appears in this plea, be at last a necessary means of satisfying the bill to Combs. The replevy bond does not of itself extinguish the rights of Combs upon the bill.

Notwithstanding the agreement stated, Combs might become entitled to the fruits of this action should the obligors become unable to pay or be discharged from the replevy bond to which he looked for security in allowing one of them to use his name for his own benefit. The unsatisfied bond did not discharge or satisfy the bill. And it is not averred that the consideration of the alleged transfer of Bohannon's supposed liability on the bill was given or received in satisfaction either of the bill or the bond, or that it was deemed, or was in fact equivalent to either. Notwithstanding the alleged transfer which, upon all the facts stated

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In the plea, was only an agreement that Bailey might prosecute this suit for his own indemnity or as a means of paying the bond, Combs retained the legal title to the bill against Bohannon. The alleged transfer gave Bailey at most but an equitable right, as against Combs, to apply the fruits of this action to the payment of the bond, or to his own reimbursement if he paid it otherwise. And not only would this equity be subordinate to the legal rights of Combs, and to his equitable right to have satisfaction of his debt from the bill or from the bond, but his own reception of the proceeds of the action before payment of the bond, would in fact accomplish the objects of the transfer and meet the equity of Bailey as fully as if Bailey himself received them. While the bond remained unsatisfied, Combs, the legal holder of the bill, and the legal and only plaintiff in the action, had a right to look to the action, and to appropriate its proceeds to his own indemnity. True, a recovery in this action and an appropriation of the proceeds, whether by Combs or Bailey, would not, as intended, completely discharge Bailey but would make him responsible to Bohannon. But whatever right Bailey might have to complain of the failure of the object which he and Combs may have expected from the prosecution of this suit, the incompetency of Combs to convert the liability of Bohannon to him into an indemnity for Bailey, cannot destroy that liability, and the mere agreement and attempt to do so cannot, while his demand upon the bill is really unsatisfied, discharge Bohannon or defeat this action in which Combs is not only the nominal plaintiff, and upon the face of the record the sole beneficiary, but in which, for all that appears in the plea, he may have a real interest for his ultimate indemnity. The plea was evidently intended to present a case resting upon the alleged agreement and transfer, without actual satisfaction of the demand upon the bill or the bond. It is, therefore, deemed insufficient and the demurrer to it was properly sustained.

We perceive no abuse of discretion in not allowing ple as No. 7, 8, 9, and 10 to be filed. They do not appear to have been necessary in addition to other pleas in the case, to a fair presentation of any substantial matter of defence. Nor do we perceive that the verdict was excessive. This last matter may, however, be more fully developed on another trial.

For the errors before noticed the judgment is reversed and the cause remanded with directions to sustain the demurrer to the replication to the plea of the statute of limitations (the 2d plea) and for further proceedings consistent with this opinion.

Brown, Lindsey, and Marshall, for plaintiff, *Robertson and Kinkead*, for defendants.

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CHANCERY.

APPEAL FROM THE SPENCER CIRCUIT.

Case 107.

Bills of Review. Chancery.

October 2.

JUDGE MARSHALL delivered the opinion of the Court which was suspended until the present time when the suspension was removed.

In 1839, Basye filed a bill against Beards representatives as non residents, attaching certain debts due to Beard's estate as means of satisfying a bond of indemnity executed by Beard to indemnify him from all loss damage, expense, trouble, &c., which might accrue from any subsequent purchase of slaves by Basye from Joshua McDonald, &c., and alleging that Mrs. M. McDonald had brought suits for six slaves purchased under said indemnity at the price of about \$1900, that he had paid \$700 of the price, and had executed three

Case stated and reference to (7 B. Mon. 133,) &c., for the facts of the case between the parties.

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notes for the residue of the price, and had incurred great expense and trouble in the defense of the said suits, in one of which in an amended bill he states that judgment had been obtained for the slaves or their alternate value assessed at \$1900, which he says he has satisfied, he prays that the \$700 which he had paid, and his expenses, &c., be decreed to him against Beard's executors, and that the judgments which had been obtained against him for the residue of the purchase money be perpetually enjoined.

The answer of Beard's executor relied mainly on the ground that the judgment in detinue had been obtained by compromise in fraud of Beard, and that Mrs. McDonald was not entitled to recover. And Basye having set out her title in an amended bill, the principal controversy was upon the effect of the judgment in detinue for the slaves and on Mrs. McDonald's right to recover them. On the hearing of that case a decree was rendered in conformity with the prayer of the bill, perpetually enjoining the judgments for the residue of the purchase money, and decreeing that Beard's executors should pay to Basye the \$700 with interest from the 24th of May, 1842, the date of the judgment in detinue, and of its satisfaction as appeared, also \$200, a fee paid by Basye in defense of that action; and \$17, his legal costs therein, to be credited by \$399 70, made on the attachment and paid over to Basye. This decree was affirmed by this Court in October, 1846, and the opinion then rendered (7 *B. Monroe*, 133,) is referred to for a more detailed statement of the pleadings and facts and of the principals involved and decided. All of which, however, so far as they are material to the present case, will be found in pages 133, 4, and 5, at the commencement, and in pages 149, 50, and 51, at the close of the opinion. It will be seen from that opinion, and appears from the record, that the action against Basye was for five only of the slaves, the sixth (Jacob,) having been sued for in a separate action against Basye's vendee—that the verdict against Basye

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was a compromise verdict, particularly as to the value of the slaves, and the Court assumed what we are now satisfied is true, that although only five of the slaves were sued for in that action, the assessed value was intended to include also the value of the sixth, the action for which was shortly afterwards dismissed. The object was to settle the controversy with Mrs. McDonald as to all of the slaves, and to lay a basis for a full recovery on the bond of Beard. The verdict therefore was not considered as evidence of anything against Beard except the fact of eviction. But this Court being of opinion upon the evidence adduced, that Mrs. McDonald had the paramount title, and was entitled to recover—that Bayse had a right to quiet her title at the expense of Beard, at least to the extent of the original contract price, and that neither McDonald nor his representatives holding the judgments for the unpaid purchase price of the slaves, had any equity either against Bayse to enforce the price, or against Beard's executors to throw the loss on him, considered that the equity of the case was fully met by enjoining the collection of the price unpaid, and restoring the money paid, which included in principle the attorney's fee and the costs. And the whole decree was affirmed.

The case now
presented for de-
cision, as claim-
ed by the bill.

In April, 1847, after this affirmance, Beard's executors filed the present bill, in which they refer briefly to the nature and proceedings of the former suit and the decree therein, and reiterating the charge of fraud in the judgment in the action of detinue, and charging fraud also in procuring the decree for the \$200 alleged to have been paid as a fee, they charge in effect that instead of paying or being bound to pay \$1900 in satisfaction of the judgment in detinue, Bayse had in fact paid or was to pay but \$1050, and had procured or quieted Mrs. McDonald's claim, and by the compromise satisfied the judgment for that sum, and that this fact was not discovered until after the former decree, which fact he charges shews that the decree was rendered for \$850 too much, and that this is ground for

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enjoining \$850 of the former decree. The bill also sets forth a statement of the notes due for the unpaid price of the slaves, and of the interest thereon, amounting altogether, at the date of the judgment in detinue to about \$1568, and insisting that Basye only lost by the judgment the sum of \$1050, of which \$399,70 were paid by the attachments, reducing the loss to \$650,30, contends that this last sum should have been satisfied by applying it as a credit upon the unpaid purchase money. And prays a decree for the residue together with the costs on the judgments against Bayse, and that his decree for the \$700 and the \$200, should be perpetually enjoined.

The defence relied upon in the answer.

Basye relied on the former decree as a bar to this bill, to which he also demurred, and in his answer he refers to and adopts his former answer to the cross bill, and not admitting the alleged discovery to have been made since the rendition of the decree he admits that after the judgment in detinue it was agreed between him and the agent of the plaintiff, that it might be satisfied by the payment of \$1050, because Billy, the most valuable of the slaves recovered, had run away from Briscoe, defendants vendee, and returned to Mrs. McDonald who still had him in possession, and was to take the risk of her title—that \$800, his value as assessed by the jury, was allowed on this account, and the other \$50 on account of his (Basye's) trouble, &c. He justifies the compromise and denies all fraud, &c., and claims that if the decree is opened, he is entitled to back interest on the \$700. It appears by the further pleadings and proof in the case, that Billy and Jacob were purchased together in February 1833, and conveyed by the same bill of sale at the price of \$800, of which \$450 was the price of Billy, and \$350 the price of Jacob—that in March 1834, Basye sold Billy to Briscoe of Mississippi, for \$550, and that long before the rendition of the judgment in detinue, it was stated by the agent of Mrs. McDonald, and by her son, that Billy had run off from Briscoe, and was in her posses-

sion. And the witness understood that this was the ground of the deduction from the \$1900, the amount of the verdict in which Billy's value was assessed at \$800.

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Upon the hearing, the Circuit Court being of opinion that all claims set up in the present bill, except such as resulted directly from the fact discovered in relation to the sum paid in satisfaction of the judgment in detinue, were barred by the former decree and affirmance, decreed that Bayse should pay to Beard's executor the sum of \$1231, composed of \$850 with the interest thereon from the date of the judgment in detinue to the date of the decree with interest on said \$1231, until paid. Bayse appealed from this decree, alleging that the Court erred, 1st, in granting any relief to the complainant; and 2d, that if the former decree is opened, it was erroneous not to have decreed interest on the \$700 decreed to him, from the time of its payment. And Beard's executor assigns for cross error that the decree should have been for a much larger sum in his favor.

In support of the first error assigned, it is contended that this bill is not a bill of review, but merely a bill re-litigating the same matter involved in the former suit, and therefore barred by the former decree. But although the bill is not called a bill of review, yet so far as it alleges and relies on a fact discovered since the former decree, not alleged, and which could not have been alleged in the former suit, because without negligence or default it was not known, and which affects the equitable rights of the parties, and would have produced a different decree if known and shown in the former record, and so far as on the ground of such newly discovered fact it seeks to change and correct the former decree, it is in substance and effect, a bill of review, and should be entertained as such, if the fact be of the character above described, and there has been no negligence or default, and if the former suit and decree be sufficiently brought before the Court.

Though a bill may not be called a bill of review, yet if it describe the case fully and rely upon an important fact discovered since the decree and that there was no negligence in not discovering it, and which fact should produce a different decree, and it is sought to correct the former decree and it has been so treated by the Circuit Court, it should be entertained as a bill of review in this Court, though the record be not expressly made part of it.

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(This bill seems to have been regarded as a bill of review by the defendant, who, in his plea, after stating that the same matters had been litigated between the same parties, and determined by the Circuit Court and the Court of Appeals, concludes by saying that no sufficient cause is shown in said bill of review why the said decree should be reviewed. And although the bill does not, in terms, make the record of the former suit an exhibit, yet it gives such a history of the proceedings and decree in that suit, and suggests such errors in the decree, and prays such relief as to leave no doubt that the record was intended to be brought before the Court, and to constitute, together with the matters set up in this bill, the ground of the relief sought. And such reference is made to different parts of that record by each of the parties in the present suit, as shows that each considered the former record remaining in the same Court, as being a part of this case. The complainant, for instance, in his original bill, after stating in general terms the object of Basye's former bill, says, "said bill and the indemnifying bond, are referred to as a better specification of the object of the bill." But the said former bill is not copied as an exhibit, and is found only in the former record. So Basye in his answer in this case says, "that he adopts his answer heretofore filed in the suit referred to in complainant's bill, with all its denials, allegations and averments, and makes it part of this answer." But he does not file a copy of it with his answer. From which fact, as well as from the manner in which he speaks of the suit referred to by the complainant, it is evident that he considered the former suit, and record as a part of this suit and record. In fact they constituted the very basis of the present bill, the object of which was to obtain relief against the former decree, and by showing from the former record and the new fact or facts now disclosed that the former decree was inequitable and erroneous. And it is evident, from the reasoning of the decree, that the Court as well as the parties

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considered the former record as a part of this. The omission to make that record, by express reference, a part of this bill, was doubtless an inadvertance not observed by either party, or by the Circuit Court, and as it was in fact in the same Court, and evidently considered by both parties, and by the Court, as a part of this case, and as being before them as such, we feel bound also to consider it as a part of the case, just as if it had been expressly made so.)

This bill does not, in terms, pray that the former decree may be reviewed, or set aside, or corrected. But it proposes to show that it was erroneous and inequitable, both as to the money decreed to be paid back to Baye, and as to the injunction against collecting the unpaid purchase money, and on this ground it asks not only for the specific relief deemed appropriate upon the establishment of these errors, but also for such relief as may be equitable. Assuming that it alleges a proper ground for questioning and changing or reversing the decree in all or any of its parts, and for ultimate relief in the matter previously litigated and decreed, then it contains the substance of a bill of review, and authorizes the Court to grant the appropriate relief, unless an express prayer for the review of the former decree, or for setting it aside, be necessary to authorise the Court to grant such relief. But the established principle is, that although the specific prayer be inappropriate, the Court may and will, upon the general prayer, grant such relief as the allegations and proof require.

It is said that a bill of review should terminate in opening or setting aside the former decree, which would leave the case, upon the original bill, undisposed of, and still open for decree. But if upon the case presented, the Court has authority to set aside the original decree, it may surely disregard it; and in fact a decree rendered on the bill of review, inconsistent with the former decree, and restraining or defeating its operation, does, in effect, so far reverse it or set it

The established rule in chancery proceedings, is that though the specific prayer of the bill be inappropriate, yet the Court may and will, upon the general prayer, grant such relief as the allegations and proof required. And if the ob-

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ject of the bill is to injoin a decree in whole or in part, or for re-payment of money under a decree, it is in effect a bill in the nature of a bill of review, though it may not in terms pray for a review.

aside. The last decree, if the Court has power to render it and to grant the relief which it asks for, must supercede a former inconsistent decree, which denies such relief. And although in strictness it may be proper that the first decree should be formally set aside, where relief inconsistent with it is to be granted, it must still be within the power of the Court to determine according to the nature of the case, and the attitude of the parties whether the ultimate relief to which the party may be entitled shall be granted on the bill of review, or in the original suit and by reversing the former decree and making a new one.

Suppose a party, after a decree against him for money discovers a fact which, although it existed prior to the decree, was wholly unknown and inaccessible to him, and which shows that the complainant was not entitled to the money, and that no such decree should have been rendered. Or suppose that he makes the discovery after the money is paid and the decree satisfied; in either case he would undoubtedly be entitled to protection against payment or to re-payment.

A perpetual injunction against a decree for money is equivalent to a reversal of the first decree and a dismissal of the bill on which it was founded, or if the money has been paid, a direct decree for its re-payment is equivalent to a reversal of the original demand and a decree in that suit for a restoration of the money. And as such summary relief granted upon a bill complaining of the former decree, alleging errors in it, and showing a right to review and reverse, would necessarily imply that the decree had been reviewed, and the objections of some of them allowed, so the prayer for such summary relief must imply a prayer that the decree be reviewed upon the errors and objections alleged. The omission to pray for a review which is only a mode of coming at the final relief cannot, therefore, be a fatal defect, and especially when the bill not only furnishes the means of making a review, and prays for a relief which implies a review, and is equivalent

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to a reversal of the former decree, but also prays for all equitable relief. To say that such a bill is barred by the very decree of which it complains, because it is not a bill of review, would be to sacrifice the substance of the rule to a mere name, and to defeat the justice and equity of the case by a mere formal nicety. We are satisfied, therefore, that a bill showing grounds for a review and reversal of the former decree, but merely praying for an injunction against it, and for general relief, or for a restoration of money paid under it, and for general relief, is essentially a bill of review, to be subject to the same tests as to the sufficiency of its allegations, and entitled to the same privileges and consequences.

We proceed, then, to consider the sufficiency of the present bill with respect to the errors or objections on account of which relief is prayed. And we concur with the Circuit Court in the opinion, that as to so much of the former decree as enjoins the unpaid purchase money, the relief now prayed for is precluded by the affirmance in this Court. Upon this part of the case the bill, in effect, claims that upon facts which either were, or ought to have been, before the Court in the original case, the decree is unjust and erroneous.

The chancellor will not sustain a bill of review for the discovery of a fact which might have been and should have been discovered before the decision of the case and which the point involved was decided by the Circuit Court and affirmed by the Court of Appeals.

No new fact, and certainly no newly discovered fact, respecting the amount of the original purchase money, and its interest remaining unpaid, is alleged or proved. There is, it is true, a specific statement now made in order to show that the unpaid principle and interest due at the date of the judgment in detinue, was nearly equal to the \$1900 alleged to have been paid or payable on that judgment. But this fact was certainly within the knowledge, or at least within the power of the complainants; and if the record did not furnish precise information on the subject, it at least showed the principal sums due, and authorized the inference that a considerable amount of interest had accrued. If it did not show this much, and if it did not contain the means of precise knowledge, the omission

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sion was the fault of the present complainants, and is wholly unaccounted for. If it did contain sufficient means of knowledge to authorize the fact to be considered, and if the fact should have produced a different decree, the error of the Circuit Court was affirmed by this Court, and the affirmance is a bar to a bill of review, and to any relief on this ground. In affirming the former decree, this Court said:

"If, therefore, Basye had paid the whole price of the purchase from McDonald, it would have been proper to have decreed a restoration of the entire sum (then supposed to be \$1,900) agreed to be paid to Mrs. McDonald, and secured by her judgment, of which satisfaction was acknowledged. But as part of the original purchase money remains unpaid, and the notes for it have never been assigned for value, but are in the hands of the administrator of McDonald's legatee, (who is the same person as the executor of Beard,) the equity of the case is answered by cancelling these notes, or enjoining their collection, and restoring the money paid. The legatee of McDonald who sold and either impliedly or expressly warranted the slaves, has no equity either against Basye to enforce these notes, or against Beard to throw the loss on him or his estate."

The Court evidently regarded the \$1900 paid or payable under the judgment in detinue, as equivalent, so far as the equity of the case was concerned, to the entire price agreed to be paid in the original purchase of the slaves, and that there was no right to recover the unpaid purchase money, whatever it was. Upon this principle, the decree which enjoined the unpaid purchase money, and decreed back that which had been paid, was affirmed. Upon the same principle, if only \$1000 had been paid or payable under the judgment, and Mrs. McDonald's title thereby secured—the only effect must have been to diminish or extinguish the claim against Beard's executor for that part of the price which had been paid. Of course the subsequent

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discovery of the fact that only \$1050 instead of \$1900, was paid under the judgment, can have no other effect, without violating the principle of the affirmance.— Whether if the attention of this Court had been called to the precise amount due on the original purchase, it might have fixed upon a different criterion for estimating the amount recoverable by Basye, is not material. The mistake in the decree of affirmance, whether of a principle of equity, or of a fact which was or should have been sufficiently presented in the former case, is conclusive in a bill of review, as well upon the Court as upon the parties.

But again, the principle that neither McDonald nor his legatee had any right to recover the balance of the purchase money, is certainly unaffected by its amount. And although under that principle Basye has made a most advantageous bargain, and instead of losing, might have been the gainer by the judgment in detainue, even if he had paid the \$1900 without recovering anything from Beard, and although he is certainly the gainer when he paid only \$1000 instead of \$1900, still this reduction gives no right to McDonald's representatives, but can only operate upon Basye's recovery against Beard's executor.

The bill sufficiently alleges the discovery of the fact, that only \$1050 was to be paid on the judgment in detainue. And as the record showed this to be the sum recovered, and Basye claimed it in his pleading as paid, without disclosing the fact that by secret arrangement he was to pay the smaller sum, not only is the complainant's ignorance of the fact sufficiently accounted for, but it is evident that in obtaining his decree for the larger amount, Basye taking advantage of the credit due to the record, and to his own averment imposed upon the justice of the Court, and upon the confidence of his adversary. It sufficiently appears, too, that the discovery was not made in time to be introduced into the former record. And as to the materiality of the fact, and the effect which it should have had, and must

Upon the hearing of a bill of review it clearly appearing that plaintiff in the first suit had obtained a decree for a greater sum than he was entitled to, and the facts showing that the decree to that extent, should not have been rendered rested in the knowledge of the complainant, and not of the defendant's knowledge.— Held that the Court should grant relief by enjoining the excess perpetually.

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now have, upon the equitable rights of the parties, these are too obvious to require argument or illustration.

The \$850 deducted from the amount of the judgment in detinue is less than the amount of the sums decreed against Beard's executor, but is more than the sums so decreed after deducting the sum of \$399.70 made by the attachment in the first suit. The equity of the case as presented by the present bill requires that this sum of \$850, supposed to have been lost by Basye in the judgment for the value of the slaves, should be considered as a part of the sum decreed against Beard's executor on account of the supposed loss, and of his costs and expenses in that action. Had the fact now disclosed been a part of the original case before decree, it should, according to the principles of that decree and of the affirmance, have precluded any decree in favor of Basye, for the \$700, formerly paid by him, by setting off the one sum against the other. And the sum of \$150, which would have remained, should have been applied as a satisfaction of the costs of the defence in the action of detinue amounting to \$17, and then to the extinguishment of one hundred and thirty-three dollars of the \$200 paid as a fee in that case, leaving of all the claims of Basye against Beard's executor, the sum of \$67, only, to be satisfied out of the proceeds of the attachment and the residue of said proceeds amounting to \$332.70, belonged to Beard's executor, and should not have been decreed against him.

If then Basye had no equity to the extent of the \$850, or any part of it, still as he was not bound to pay the unpaid purchase money, Beard's executor cannot on the ground of the discovered fact as to the \$850, be entitled to recover anything more than Basye has inequitably received under the decree. As to so much as was not received, a perpetual injunction would have been the appropriate relief. The bill does not allege that the amount formerly decreed to Basye had been paid. But as there has been no intimation that it has

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not been since paid, and as the sum now decreed against Basye, is just about equal to the sums formerly decreed to him with interest, and in any event justice can be done by a set off on motion ; and as the property decreed on the ground of non payment of the former decree has not been questioned even in argument, and is not reached by any assignment of error, we do not feel bound if indeed we are authorized to reverse the present decree on the ground that it decrees payment of the whole sum against Bayse, when it does not appear and is not alleged that he had received it. This error goes only to the mode of relief and would not justify a dismissal of the bill, which is claimed by the first error assigned. The second error assigned clearly does not reach this question. And it is only necessary to say with respect to it that in deciding that Basye was not entitled to the \$700, formerly decreed even with interest from the date of the judgment in detinue, we of course deny his claim to any previous interest on that sum. The cross error has already been in effect disposed of.

The only remaining question then is, whether the defence relied on by Basye as justifying and supporting his claim for the \$850 deducted from the amount of the verdict in detinue, entitles him to the whole or any part of that sum, or should produce any modification of the decree rendered against him in this case. There seems to be no doubt that \$800 of the \$850 was deducted on account of the assessed value of Billy, which was agreed by the parties to the action and inserted in the verdict by them. And although there is no evidence that Billy was, and had long been, in possession of the plaintiff, except by proving the statement of her agents, to her counsel, and to Basye, there seems to be but little doubt that this fact, as understood by them, was the basis of the arrangement, and the fact itself is probably true. But, if true, the plaintiff had no right to recover Billy, and certainly no right to his value; and considering that the verdict was made up by agreement of the parties, Beard's executor being ignorant

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of it, has a right to regard it as it substantially was, as a recovery only of the other slaves and their assessed value, which was eleven hundred dollars.

The \$50 allowed (strangely enough) to Bayse as some compensation for his trouble, &c., in defending the action, and resisting the plaintiff's claim, gave him no right to demand that sum against Beard's executor—and especially when without disclosing this allowance he claimed and obtained a decree for such loss and expenses as he could prove.

But it is said that Bayse is still liable to Briscoe for the price of Billy, viz: \$550 which should have been provided for in this decree, at least to the extent of \$450. There is no evidence, however, except that which, as to Beard's executor, is hearsay merely, that Briscoe has ever lost Billy even by his running away, and there is no evidence whatever that there has been any judgment against him for Billy, either in an action by him or in one against him, nor is it shown that Bayse can, in any manner be subjected to a loss by reason of his sale to Briscoe, from whom he received more for him than he gave, nor that any suit has been brought against him on that account. It is to be recollected that Beard bound himself not to warrant, but to indemnify against loss. There has certainly been no loss to Bayse, as yet, on account of the purchase and sale of Billy; and we do not perceive that he has made out a case requiring at the hands of the Chancellor any other indemnity than that afforded by the original bond of Beard. Whether by his own acts he has lost his recourse upon that bond, it will be time enough to determine when he seeks it upon a case calling for it.

Wherefore the decree is affirmed.

Hardin, and Riley, Moorehead & Reed for appellant,
Grigsby for appellee.

Madeira's heirs vs Hopkins, &c.**CHANCERY.****ERROR TO THE KENTON CIRCUIT.****Case 108.**

Vendor and Vendee. Frauds, Statute of. Decrees void and erroneous.

Judge Hise delivered the opinion of the Court.

January 7.

JACOB MADEIRA was the owner of a number of town lots in Covington, including those designated in the plan of the town by the numbers 234, 235, 236, and 237, situate between Sanford and Greenup streets, and north of Fifth street: he also owned the ground lying between Greenup street and Sanford street extended, and having Fifth street on the north, and the town boundary on the south. In the latter part of the year 1829 he died in the city of Cincinnati, leaving a wife and three infant children, to wit: George, Addison D., and Aston Madeira. George Madeira died shortly afterwards without issue.

Case stated and proceedings had in the Circuit.

Mary Madeira, the widow, E. S. Haines, and O. M. Spencer, were appointed and qualified as administrators of Jacob Madeira's estate in the city of Cincinnati, where they and the family of the deceased resided at the time. O. M. Spencer did not long survive his appointment.

In May, 1831, William Hopkins filed his Bill in chancery in the Campbell Circuit Court against Addison, George, and Aston Madeira as the heirs, and against Spencer and Haines as the administrators of Jacob Madeira, deceased. Who were all charged to be non-residents, and alleging in substance that he had purchased from Madeira, in his lifetime, the lots and block of ground above described on the 15th of July, 1828, for the sum of \$600; \$200 of which he charged was paid in cash at the date of the contract, and the balance to be paid in six, twelve, and eighteen months, with

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interest until paid, that Madeira then executed and delivered his bond to him, to convey the said lots which Hopkins professes to exhibit in the bill, (although no such bond is now produced, nor is it shown that any such was ever in fact lodged with the papers, or filed in the cause.) He alleges further, that of the ballance of the purchase money he paid to Jacob Madeira, deceased, on the 11th day of May, 1829, \$106.50 for which Madeira gave a *receipt* in *writing* on the *bond*—that on the 5th December, 1828, he paid to Madeira's administrator fifty dollars, as shown by his receipt on the bond, and that he paid also to the administrator on —day of——seventy-five dollars in a note on Thos. D. Carneal, that there was yet due of the purchase money \$175 as claimed by the administrator, which he professes to tender in Court as being the balance of the purchase money, and interest due on the contract. On the same day this bill was filed, and at the same term an order of warning was entered, and publication thereof directed. But it does not appear that publication was ever actually made, or that there had been any service whatever, either actual or constructive, upon the heirs or administrators of Jacob Madeira, deceased, or either of them. Nevertheless, at the next ensuing term of the Court, on the 6th of August, 1829, a guardian *ad litem* was appointed to answer and defend for Madeira's infant heirs, who forthwith, on the day of his appointment, filed their answer, in which they profess to be ignorant of the matter alleged, and claim that their rights and interests may be protected by the Court, and thereupon at the same term, and on the same day, in the absence of any proof whatever to sustain the allegations of the bill, a decree is rendered which, after reciting that the cause was heard by *consent*, orders and decrees that "unless the defendants shall, on or before the 15th day of the present month of August, execute to the complainant, William Hopkins, a deed of conveyance, relinquishing all their right, title, and interest in and to the lots of land mentioned

and described in the complainants bill, that in that event ^{MADIRA'S N'S} Thomas N. Lindsey, who is hereby appointed commissioner for that purpose, convey, by proper deed of ^{to} HOPKINS, &c. relinquishment, all the estate, right, title, and interest in and to the lots of land mentioned and described in complainant's bill, and report, &c. And it is further ordered that upon the execution of the deed aforesaid, the Clerk of this Court pay over to the defendants, Haynes and Spencer, the administrators, the sum of money now in Court."

Lindsey, the commissioner, by authority of this decree, executed a deed to Hopkins, dated 21st of August, 1831, conveying to him all the right, title, and interest, of Aston, Addison D., and George Madeira, as heirs of Jacob Madeira, deceased, in and to the lots numbered 234, 235, 236, and 237, but the commissioner omitted and failed to include in this deed the block of ground between the said lots and the town boundary.

This deed was reported by the commissioner at the October term of the Court in 1831, and ordered to be recorded. The omission to include the block of ground above named in the deed referred to, having been discovered, doubtless the same commissioner, after more than two years had elapsed, executed a second deed to Hopkins, dated the 4th November, 1833, including therein the block of ground, as well as the lots which had been previously conveyed, and on the same day reports this last named deed to the Court which, upon his acknowledgment, was ordered to be recorded.

Hopkins, about the time or shortly before he instituted this suit, took possession of the lots and the adjacent land, and continued in possession until he sold the same in different lots and parcels to Thomas Green, John W. Clayton, James Hopkins, and James M. Gaines, all of whom, (holding under the complainant, Hopkins, by executory contracts and deeds of conveyance,) or their vendees, are now in possession of the said lots and block of ground since laid off into lots, and upon which considerable improvements have been

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Second suit of
 Hopkins as the
 heirs, &c., and
 proceedings had

made. Wm. Hopkins doubtless apprehending that he had not secured the title by the proceedings begun and terminated in the Campbell Circuit Court, as above recited, after the county of Kenton had been formed, so as to include the city of Covington, which before had been embraced in the county of Campbell, on the 29th June, 1848, files his bill in chancery, in the Kenton Circuit Court, against Addison D. and Aston Madeira as the heirs at law of Jacob Madeira, deceased, alleging that they were non-residents, and that the title-bond of their ancestor (which he had professed to exhibit in his bill of 1831,) for the lots and block of ground in controversy had been either mislaid or improperly taken out of the papers of the former suit, and had been lost, so that after diligent search and inquiry he was not able to find it. He alleges that he had paid to Madeira, in his lifetime, and to his administrator since his death, and by the tender and deposit in Court, when his first suit was pending in the Campbell Circuit Court, \$175 in cash, the whole of the purchase money due, and asks for a decree to establish the lost bond, for a surrender of the title of Madeira's heirs, and for a conveyance of the property to him by them, or by a commissioner.

Answer of A. D.
 Madeira made a
 cross bill.

A. D. Madeira, no doubt, hearing of the institution of this suit, though a non-resident, without service of process, and having in the mean time attained the age of twenty-one years, answers the bill of Hopkins, denies the allegations of complainant made therein, sets up claim to the property as one of the heirs of Jacob Madeira, deceased, and by cross pleading demands to have the possession delivered to him and his brother, (who also appeared and plead,) and that an account be taken of rents, and for general relief. The decree and subsequent proceedings had in the suit in the Campbell Circuit Court in 1831, are relied upon in this case by Hopkins, and his vendees in their defence to the cross bills of Madeira's heirs, who exhibit the entire record of that suit in their pleadings, and assail the de-

decree rendered in that case as wholly fraudulent and void.

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Decree of the
Circuit Court &
agreement of parties
as to its revision.

After the vendees of Hopkins and the persons in possession of the lots were all made defendants, served and brought regularly into the case, the proof taken, and the case submitted, the Circuit Court rendered a decree against Madeira's heirs, pronouncing the former decree to be void, and directing them to convey the lots and the block of ground adjacent, as mentioned in the bill, on or before a given day, by a deed warranting the title against all persons claiming under their ancestors to the extent of the estate inherited, or to be inherited from him.

As before observed, the decree rendered in the suit of 1831 is expressly impeached in this case as erroneous, fraudulent, and void; and the record thereof is exhibited, and Hopkins and his vendees rely upon it in defence. Although the cross bill of Madeira's heirs may not present, in its form, technically the precise features and characteristics of a bill of review, yet it has all its essential and substantial requisites. And the Court below, upon the pleadings in this case, had authority and jurisdiction to try and determine upon the validity of that decree, and if it was erroneous, as apparent from the record, or void or voidable, the Court might properly, in this case, have so adjudged and decreed. If correct in this view, the writ of error prosecuted by the plaintiffs in error to the decree in this case presents for the revision of the Court both decrees for reversal, if there be error, and for affirmance if there be none. However this may be, both decrees are before this Court for revision, and errors assigned as to both as though writs of error had been prosecuted in due form in each case, by express agreement of the parties in writing filed with the record, made, doubtless, to save unnecessary expense and to avoid a multiplicity of suits. For it seems Madeira's heirs were also prosecuting an action of ejectment against the parties

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in possession in the Circuit Court, which was discontinued upon the faith of this agreement.

The decree of 1831, rendered by the Campbell Circuit Court, is at least erroneous, if not absolutely void, for the following reasons.

A decree without service of process actual or constructive, held to be void.

The answer of guardian *ad litem* putting complainant on the proof of the allegations of his bill, no decree can be rendered for complainant without proof: (6 B Monroe, 247.)

1st. There was no service of process upon the defendants, Madeira's administrator and infant heirs, who were non-residents, either actual or constructive.

2d. The decree was wholly unauthorized, because, upon the answer filed for the infant heirs by a guardian *ad litem* appointed to defend for them, the complainant, Hopkins, was put upon the proof of the allegations in his bill, that he had paid the purchase money for the lots, and that such bond as that alleged to have been granted by Madeira, did in fact exist at all, as it does not appear to have been produced. But the Court forthwith, upon the bill and answers without proof of any single allegation made by complainant, renders a decree against the defendants, divesting them of their right to their property, when, as the record stands, it does not appear whether such bond as that described then, or ever, in fact, existed, except by the allegations of the bill unsupported by proof. For though the guardian *ad litem* was irregularly appointed when the infants were not served, yet, having answered for them, placing them, as infants, without information of the matters alleged, under the protection of the Court, it was error to decree against them at the very term at which the answer was filed, and in fact no decree should have been given against them without proof of every material allegation in the bill. See the case of *Chambers, &c., vs Warren*, (6, Ben. Monroe, 247.)

If this decree of 1831 be set aside and reversed for the gross and manifest errors disclosed by the record, then Hopkins' claim, so far as attempted to be sustained by it, and the commissioners deeds made under it to him, must fail, and his vendees, and those holding under him, are in no better condition. If Hopkins' title fails, those who hold under him can derive none from him.

The parties in possession holding under Hopkins, find this link broken in their chain of title in attempting to make out its derivation from the plaintiff in error.

Whether the decree and subsequent proceedings of 1831 be impeached and set aside in the present suit for gross apparent error or for fraud, or by a reversal as upon a writ of error now prosecuted under the agreement of the parties, the consequences would be the same; that Hopkins' title, as thence derived, must fail, and his vendees can derive no title from him. They cannot be protected as innocent purchasers, having procured the legal title against an outstanding prior, but undivulged equity, of which they had no notice. They must be regarded as having constructive notice of all which is disclosed by the record with respect to their chain of title. In tracing the title of Hopkins, as shown by the record, they must have found that he held, under commissioner's deeds, made in virtue of a decree rendered against Madeira's infant and non-resident heirs, subject to be reviewed, impeached, and set aside as fraudulent and void, or reversed by this Court at any time before a writ of error should be barred by lapse of time. And a purchaser of land at private sale, holding under a party who has attempted to procure title thereto by a decree of a Court of Equity directing a conveyance to be made to him by a commissioner, who, without the intervention of a public decretal sale, does convey to such party, must purchase, under the risk incurred, that the decree constituting a link in his chain of title, is subject to be reviewed or reversed, and so long as it is so subject, he will be regarded as a purchaser *pendente lite*, and the rule, "*caveat emptor*," applies to him. This view is abundantly sustained by the opinions of this Court heretofore pronounced in the cases of *Debell vs Foxworthy's heirs*, (9, Ben. Monroe, 230,) and *Olary, etc., vs Marshall's heirs*, (4, Dana, 98.) In these opinions the distinction is taken between cases where a party derives title by purchase at a public sale by an officer or agent

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A purchaser is presumed to know the derivation of the title of his vendor held under a decree against infant and non-resident heirs, the rule *caveat emptor* applies to such purchasers: (4 Dana, 98. 9 B. Monroe, 230.)

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But if the purchase be under a decretal sale, the right of the purchaser in general will not be affected, though the decree be erroneous if it be not void.

of a court of competent jurisdiction authorized by a judgment or directed by a decree of such Court. And in cases where a party, by the judgment or decree itself erroneously rendered in his favor, procures, without the intervention of such judicial or decretal sale, a defective title directly adjudged or decreed to him.

In the former case the title, in the absence of fraud, will not be disturbed, whether the judgment or decree if not void, but merely erroneous, be or be not reversed. In the latter case the title of the party and those holding under him is subject to fail and to be defeated by the reversal of the judgment at law, or decree in equity, under which such title is derived. The reasons for this distinction are apparent, and have been so fully presented in the cases referred to that it is not necessary to add to or repeat them.

In the opinion delivered in the case of *Talbot's executors vs Bell's heirs*, (5, *Ben. Monroe*, 326,) it is declared that when the title and possession of land has been procured by an erroneous decree which is afterwards reversed, the chancellor may and should direct the possession to be surrendered, and that an account should be taken of rents and profits, waste and improvements upon equitable principles, and full justice be done between the parties.

The title of Hopkins and his vendees thus failing, so far as it is attempted to sustain it by the decree and commissioner's deeds of 1831. the question is directly presented upon the errors assigned to the decree of the Kenton Circuit Court rendered in September, 1850.

It is insisted that the decree should be reversed, because,

1st. It is not satisfactorily proven that Madeira ever did execute and deliver any title bond at all to Hopkins, by which he bound himself to convey to him the lots and ground in contest, and that if there was ever any contract between the parties in that respect, it was not written but verbal merely, and that it was not executed by the payment of the purchase money, or the

conveyance of the lots, before the death of Madeira, which occurred shortly after, in 1829.

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2nd. That if it be conceded that Madeira had executed and delivered in his lifetime, a bond for the conveyance of any lots, or ground, in the town of Covington, to Hopkins, and that it was lost; yet that a Court of equity cannot decree a specific execution of such contract, and direct a conveyance of the lots and land in contest, to Hopkins, because the contents of the lost bond have not been satisfactorily shown by the proof. And because it does not appear with sufficient certainty what was the number and position of the lots and land to be conveyed, or at what time and upon what terms, and conditions the conveyance was to be made. As to the point first made. It may be remarked, that from the gross inconsistencies, contradictions, evasions, and false statements, so easily detected in the bills exhibited by Hopkins, in 1831, and in 1848, and in his answers to the cross bill of Madeira's heirs, when compared with each other, and with the depositions in the case, and especially that of Haynes, Madeira's administrator, doubt might well be inspired as to whether any written contract had been executed at all by Madeira, for the sale of the lots in contest to Hopkins. But Carneal proves that a title bond for the conveyance of *several lots* in Covington, was executed and delivered by Madeira, to Hopkins, and it should not be assumed in direct opposition to the evidence, of Carneal that no such bond ever existed.

The force and validity of the second objection presented, must depend upon the effect to be given to the evidence of Carneal, who is the only witness by whom the existence or contents of the written contract alleged, is proven.

If the bond itself, was in existence, it should describe the lots that were sold and if the consideration be not paid, also the terms and conditions upon which they were sold, the time and manner and amount of the payments to be made with such certainty, that it might be executed

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specifically, according to its provisions, as collected from its perusal; without there being any necessity for a resort to be had, to oral evidence, to ascertain the mutual rights and obligations of the parties. And so if the bond be lost, and its loss is to be supplied by proof of its contents. The contents as proven, should so indentify the lots sold, as that a Court of equity would be able to ascertain by the description given, in case the writing was in existence, and produced, what land was to be conveyed; and further, if the consideration be not executed, and the purchase money not paid, and it appears that the lost bond provided that the land was not be conveyed until after the price agreed to be given, was paid, in such case, the proof should show the terms of the contract, as to the amount of the purchase money when due, &c. So as that the Court might know if the contents of the bond as shown, were reduced to writing, from its inspection alone whether the party had entitled himself to a specific execution by a compliance with the terms and conditions imposed on him by the contract, otherwise according to the statute of frauds no action or suit can be maintained to enforce it, nor can a Court of equity decree its specific execution. In fine the complainant in this suit is not entitled to the relief sought unless it be proven that a bond once existed, that it is lost, and that its contents are such, as that if it existed now, it should and could be specifically executed, according to its terms, to be collected from its inspection alone.

If an executory contract for the sale of land be executory on the part of both vendor and vendee, the writing itself should show what are the terms of the contract to be performed by each party, without a resort to parol proof: See *Kay & Co. vs. Ward*. (5 B. Mon. sec. 101.)

If a contract for the sale of land be executory in its character, both with respect to the undertaking of one party to convey, as well as to the undertaking of the other to perform conditions in respect to the payment of the purchase money, to take the same out of the statute of frauds, it is necessary that the land should be so described on the one hand, and the consideration and terms on the other, as that neither party, in demanding specific execution, may be put to the necessity or permitted to go outside of the written contract to show by parol proof, what he was bound to perform,

or what performance he might exact from the other, to entitle the one or the other to have the contract enforced; it is so settled in the case of *Kay & Casey vs Curd*, (6 B. Monroe, 101,) and other cases cited there; also in numerous adjudged cases in the Courts of several, if not all, the States of the Union, where the provisions of our statute of frauds have been literally or substantially adopted.

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The fact assumed and charged in the bills and denied in the answers, that Madeira had delivered his bond to Hopkins for the conveyance of the land in contest, is sustained by the testimony of a single witness, Thomas D. Carneal, by whom alone, also the supposed contents of this bond alleged to have been lost, is attempted to be proven. His statement is as follows:

"I purchased from him (Madeira) *several lots*, for William Hopkins, arranging with him for Hopkins to receive a note held by Hopkins against Samuel Winston for the first instalment. (A bond by Madeira was given to Hopkins for the lots, and notes executed by Hopkins for the ballance of the purchase.) And on payment of the notes a title was to be made to Hopkins. Thus having closed the purchase for Hopkins, I cannot say how that ballance was paid or the transaction closed.

"The lots were west of Sanford street, and extended south to the Covington line, and included, where Hopkins, in 1828, made brick for me."

If the contract itself could be produced, and its terms were as vague and uncertain as the above statement of its contents, could it be specifically executed without a resort to parol evidence to ascertain, if possible, what was the total amount of the purchase money to be paid, at the date of the contract? In what instalments, and at what periods was the residue of the price to be paid? And was, or was not, interest payable on the first instalments? If not, should then the parol substitute for the lost bond, as exhibited by Carneal's deposition be enforced? When that parol substitute

Proof of contents of lost bond for lots, analysed and determined to be insufficient to authorize a decree for specific performance.

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itself cannot be specifically executed unless it be explained, amended, and added to materially by other parol proof as to the terms and conditions, upon a compliance with which Hopkins might demand a conveyance? The answer must be in the negative. The doctrine that lost bonds may be supplied, set up and established by parol proof of their existence, loss, and contents, would be calculated to produce, of itself, much of the moral evil, (in the commission of frauds and perjuries,) which the statute of frauds was intended to guard against and prevent, unless in such cases clear distinct, creditable, and satisfactory proof should be required. How much more mischief would ensue, if the substitutes for lost bonds, presented in the form of statements of witnesses, given from recollection should be enforced by Courts of Equity, when so vague and uncertain as that a further resort must be had to blind conjecture and presumption, in order to learn the rights and obligations of the parties.

No witness but Carneal knows or proves that any written contract existed between Madeira and Hopkins, therefore no other can possibly know or prove what it contained. Other witnesses, it is true, prove circumstances and give their recollection of conversations with Madeira after a lapse of about twenty years had intervened, tending to show that there had been a contract verbally entered into between the parties with respect to the sale of the lots and ground claimed by Hopkins, but they cannot and do not prove the terms of such verbal contract.

Carneal's deposition does not set forth a contract which can be executed, unless his omissions had been supplied by other parol evidence which has not been done.

Madeira's heirs have denied, and Hopkins has wholly failed to prove, the payment to Madeira in his lifetime, or to his heirs or administrator since his death, the amount of the purchase money which he himself admits he was to pay for the lots. Carneal's version of

The chancellor will not decree a conveyance of land, unless the consideration be paid.

the contract is, that the title was to be made on payment of the notes given for the purchase money. Now, a Court of Equity would not require Madeira's heirs to convey, unless Hopkins should pay, or offer for payment, the whole amount of the purchase money and interest that might be due. But as the terms of the contract are not proven, as it does not appear what was the amount of the price to be given for the land. The Court cannot know from the contract itself whether Hopkins has performed, or will perform, the conditions upon which his right to a conveyance must depend. Carneal says "he arranged with him (Madeira) for Hopkins to receive a note held by Hopkins against Samuel Winston for the first instalment."

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If the witness means by this statement that one instalment for the lots was paid in hand in a cash note on Winston, yet he fails to give the amount of this payment, as well as the entire amount to be paid for the lots. So that the contract as proven, is within the statute of frauds and perjuries, and is too vague and uncertain to be enforced in a Court of equity. The Court therefore, should have dismissed the bills and amended bills of Hopkins, so far as he sought therein to have specific execution of the supposed contract, or a decree against Madeira's heirs for a conveyance of the lots and block of ground in controversy, and a decree should have been rendered in favor of Madeira's heirs on their cross bill, establishing their claim and title to said lots and land.

The present actual cash value of the permanent and lasting improvements made on each of the lots, and the block of ground adjacent, (now perhaps also divided off into lots,) and by whom made; the annual value of the rents of the lots and ground as unimproved, the length of time the several lots and land has been occupied by Hopkins, and those holding under him respectively. The amount paid by Hopkins to Madeira in his life-time, or to his administrators since his death, for the property, and when paid, are matters of fact which

Where a vendor and sub-vendee received & held possession of lots of ground under a contract which could not be specifically enforced against the vendor: Held that vendor should pay the value of improvement at the time of assessment and vendee the value of the use

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of the lots during their holding them, irrespective of improvements. If improvement excresced rents, then a lien upon the lots until paid.

A vendee sells to sub vendee who improves, if the first contract be cancelled, the sub-vendee has a lien for improvements on the lot which is superior to first vendee for purchase money paid by him.

should be ascertained by the Court, through a commissioner authorized to take proof and report the necessary information upon the subjects indicated to be collected from the evidence already taken in the cause, and from the testimony of other witnesses, who may have knowledge of any, or all, the matters referred to above.

In estimating the improvements made on the various lots, their actual cash value at the time when the inquiry is being made, and not their cost, is to be ascertained.

In estimating the rents to which Madeira's heirs are entitled, the annual value of the use of the lots and ground, exclusive of the improvements thereon, should be allowed and decreed to them against the several occupants of the different lots respectively, each being required to pay rent for the period only of his occupation.

The value of the improvements on the several lots should be separately ascertained, and the heirs of Madeira should pay the values thus ascertained, diminished by the rents properly to be credited, to the various occupants and claimants who it shall appear are entitled to the ballances allowed for improvements on each of the lots severally; and the several parties entitled have liens upon the lot or lots as improved by them, and if the heirs of Madeira shall fail, upon a reasonable day given and fixed by the Court, to pay the ballances decreed for improvements, the Court should order a sale of the several lots with the improvements on each, or so much thereof as may be necessary to pay the sums due to each of the parties entitled after deducting rents due from such party.

The accounts between Madeira's heirs and Hopkins consisting of payments heretofore made by Hopkins, and of rents chargeable against him should be adjusted and if the ballance be in favor of Madeira's heirs, Hopkins should be ordered to pay it. If in favor of Hopkins, Madeira's heirs should be required to pay him by a day fixed, and on failure to pay the sum, Hopkins may have a lien on the lots subordinate to that of his

vendees, to enforce the payment. After the sums decreed for improvements have been paid, if paid by Madeira's heirs without a sale of the property, then the Court should order and decree that the possession of all the lots be surrendered, with the improvements thereon, and delivered to Madeira's heirs, and process awarded to enforce the decree. If, however, the sums allowed for improvements are paid only by a sale of the whole property, the Court should order the possession to be given to the purchasers; and if, by a sale of only part of the property, the possession of the residue thereof should be delivered to Madeira's heirs, the Court should so order, and have the order enforced. Upon the return of the cause the persons now in possession of and claiming the lots, and those from whom they severally derive their claim, may amend their pleadings and, if necessary, be allowed to bring other parties before the Court, in order that there may be an equitable adjustment of all matters in controversy as it respects their several rights and obligations, arising from the sales and purchases of the property or parts of it as made between them; and the Court should retain the cause for the purpose of finally settling all interests involved, and disposing of all the matters in controversy according to the principles of equity as indicated in this opinion.

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Wherefore the decrees of the Circuit Court, rendered the 6th of August, 1831, and the decree rendered on the 21st day of September, 1850, are each reversed, and the cause is remanded for further proceedings to be had, and orders and decrees rendered in conformity with this opinion.

Harris, Harlan, and Lindsey, for plaintiffs; *Benton & Morehead and Stevenson*, for defendants.

CHANCERY. **Dudley vs Trustees of Frankfort, &c.**

Case 109.

, APPEAL FROM THE FRANKLIN CIRCUIT.

Equity Jurisdiction. Corporations. Possessory title.

January 17.

JUDGE HISE delivered the opinion of the Court.

Case stated in
complainant's
bill.

On the 21st day of August, 1847, the Board of Trustees of the town of Frankfort, at a regular meeting, as alleged by them, passed the following order:

"*Ordered*, That the Marshal, under the direction of the street committee, forthwith remove all obstructions, of what nature or kind soever, in Mero street, commencing at the Penitentiary and extending to the Kentucky river and report to the Board at its next meeting."

It appears that Wm. T. Herndon was the town Marshal, and as such was about to proceed in the execution of this order, and in so doing declared his intention to Jephthah Dudley, that he would remove the fence enclosing a block of lots owned and possessed by him, on its south side, on the ground assumed, that it obstructed and included a part of Mero street, within Dudley's enclosure.

Whereupon Dudley, on the third of September, 1847, instituted this suit in chancery against Herndon, the town Marshal, and against L. Sneed, P. Swigert, H. Wingate, J. W. Pruett, O. Brown, C. G. Graham, and James Harlan, the Trustees of the town of Frankfort, alleging that he was the owner of a block or square of ground composed of eight lots, bounded by his enclosure, and having Washington street on the west, Mero street on the south, and St. Clair street on the east, and the town limits on the north; that Herndon, the town Marshal, had declared his intention to pull down his fence on Mero street, enclosing his lots on the south side, and that he was so directed and authorized by the

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Trustees of the town of Frankfort; that Herndon recognized the power and authority of the Trustees to take and change the possession of any real estate in the town; and that he is unable to defend by force his possession of said lots against Herndon and the Trustees, who are charged to be his accomplices in the design, and therefore appeals to a Court of Chancery for relief, and to have the matters settled peaceably, according to law; that it was the duty of the Trustees, before proceeding by force, to have done the same. He makes Herndon, Marshal, and P. Swigert, and others, the Trustees, defendants, prays that they be enjoined and restrained from disturbing his possession of said lots, and for general relief.

The defendants filed a demurrer and answer to the bill, and moved upon notice to dissolve the complainant's injunction. The Court, before deciding upon the demurrer or motion to dissolve, appointed a commissioner with directions to take testimony upon notice to the parties, and to ascertain by a survey and proof whether complainant's enclosure extended into Mero street, and if so, how far, or how much of the public streets Dudley had enclosed within his fence, if any, and to make his report at the ensuing term of the Court.

Demurrer of defendants to the bill and answer.

The commissioner reported the evidence taken by him, and the notes of the survey which had been made under his direction by the County Surveyor, and the cause having been submitted, complainant's injunction was dissolved and bill dismissed by the Court, and Dudley has appealed to this Court.

Commissioner's report, decree and appeal.

It is contended that the bill was properly dismissed, because a Court of equity had no jurisdiction of the cause as presented, and no power to grant the relief sought; that it is a proceeding merely to enjoin and restrain the defendants from committing a trespass upon the property of the complainant, and that he has not exhibited a case which authorizes the interposition of a Court of Chancery, because it is not alleged; nor

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does it appear that any irreparable injury is anticipated or will be done to his property, or that a Court of law could not furnish ample redress, or that the defendants are not able to make good any damage and injury resulting to the complainant, from the trespass which they have intended to commit on his property, and that therefore a Court of equity has no right to interfere for the protection of the complainant against the violence and injury to his property apprehended by him, because the defendants are abundantly able to pay all damages accruing to him from any trespasses which may be committed by them.

One having title
to land and being
in possession,
may sue any per-
son setting up
claim thereto:
(Stat. Law 249.)

The answer to these and like suggestions may be found in the 29th section of the act of 1797, regulating proceedings in equity, (1st Statute Law, 294,) which provides "that *any person* having both the legal title to, and the possession of land, may institute a suit against any other person setting up a claim thereto." Now Dudley, in his bill, says that he purchased these lots in 1813, and that they have, ever since that time, been enclosed with a good and sufficient fence, and occupied by him as his own property, up to the day on which his suit is brought. That Herndon and the Trustees are setting up claim to a part of complainant's lots is substantially alleged in the bill, and not denied, but admitted in the answer of the defendants, who not only set up claim and title to land within the complainant's enclosure, but have assumed further, the right, by their own *ex parte* orders, and with strong arm to enforce their own claim, and violently deprive the complainant of the enjoyment of his land, which he has had continually in his possession, as a purchaser, for thirty large odd years, as alleged in his bill.

Herndon, in the answer, admits that he was only prevented from "*removing the obstructions*" in Mero street by the complainant's process, (the injunction.) Now, unless he intended to consider and determine that the southern enclosure to Dudley's land was an obstruction to Mero street, and therefore to tear it down, the

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complainant's injunction could not have interfered with his forcible operations. He was not prevented by *that injunction* from tearing down any other enclosures or buildings, or removing any other assumed obstructions in or on Mero street, by the very plenary authority which he supposed he had under the order of the Board of Trustees. He was only prohibited by complainant's process from tearing down complainant's enclosure; and as he admits, his operations were thus cramped, of course he means to say that if he had not been restrained by an authority somewhat superior to that of the Board of Trustees, whom he was about to serve, that Dudley's fence would have been demolished.

Herndon sets up claim on behalf of the Trustees to part of complainant's lots, and the Trustees assert that part of Mero street to which they claim title, has been included in complainant's enclosure and possession, and they claim the legal right and title, therefore, to part of complainant's land, occupied and claimed by him, and to which, if his bill be true, he has the legal title and possession, and the defendants not only claim part of the land, but they contend for the right and power to enforce their own claim by violence,

1st. Under and by virtue of their authority as Trustees of the town of Frankfort.

2d. Because the legal title to the streets is vested in them: and

3d. Because, further, they have ample means and ability to pay all cost and damage resulting to complainant from any trespasses committed by them upon his property.

Now, upon the first ground assumed, it cannot be admitted that because the Trustees of the town of Frankfort have been vested, by law, with special privileges and powers as a municipal body, or corporation, therefore, that such corporation, by the orders of the municipal council, and the executive acts of its agents, can encroach upon or violate private rights, and seize upon or take by force either the real or personal property of

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Though the trustees of Frankfort have the right to keep the streets and alleys open, they have not the right under pretence of doing so, to encroach upon the property of the citizen.

The trustees of Frankfort may maintain trespass for injuries done to streets & alleys: (Stat. Law, 294, §7.)

the citizen, or give judgment on their own claims to private estates, and carry them into execution, through the instrumentality of their Marshal.

Upon the second ground assumed, we remark, it is true that by the 8th section of the act incorporating the Trustees of the town of Frankfort, (*Acts of 1838-9, page 179,*) they have "power and authority to clear the streets, alleys, side-walks and pass-ways in said town of all obstructions." But by this act they have no authority under the pretext of removing such obstructions in the public streets to tear down the enclosures and take possession, for public use, of the lands and lots of the citizens. The Legislature has not conferred, and could not by law confer such authority upon them, unless in accordance with that provision of the constitution which declares that "no man's property shall be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him." In executing the powers given to them by their charter "to clear out and remove obstructions from the public streets, &c.," they must take care that the obstructions attempted to be removed are in and upon the streets, and are not the enclosures merely of the private grounds of the citizens. If the complainant's enclosure in fact embraced a portion of what had been Mero street, then, unless the title thereto in him had been ripened and perfected by the lapse of time, they were under no necessity of resorting to violence, but had a plain and peaceful remedy for redress under the provisions of the 7th section of the act above referred to, which provides that the Trustees "shall have full power and authority to maintain and carry into judgment and execution any action or actions of trespass for any injury done to the streets, alleys, &c., and may in like manner maintain and carry into judgment and execution any other appropriate action or actions for the recovery of their property, or damages for the detention, taking, injury, or destruction of the same, and the same process may issue and

execution be awarded as are applicable by law to suits by private individuals."

Upon the third ground assumed, to wit: that complainant had no right, by bill in equity and injunction and restraining order, to impede or prevent the contemplated trespass upon his property and destruction of his enclosure, because complainant has not shown that the injury anticipated would be irreparable, because, as insisted, the Marshal and Trustees are fully able to pay all cost and damage resulting to complainant by the commission of such trespasses, and that complainant has not alleged to the contrary in his bill.

It may be replied that although the defendants may be able to pay any reasonable sum for damages done to complainant's property, yet it is not so certain that they would be willing to pay unless coerced; and according to a very common but pertinent adage, "an ounce of prevention is worth a pound of cure."

No serious doubt is entertained upon the question of jurisdiction in this case. In *2d Story's Equity*, page 206, section 927, it is said: "An injunction will be granted against a corporation, to prevent an abuse of the powers granted to them, to the injury of other persons." And again, on page 207, section 928: "Formerly, indeed, Courts of equity were extremely reluctant to interfere at all, even in regard to cases of repeated trespasses, but now there is not the slightest hesitation, if the acts done or threatened to the property would be ruinous or irreparable, or *impair the just enjoyment of the property in future*. If, indeed, Courts of equity did not interfere in cases of this sort, there would be, as has been truly said, a great failure of justice in the country." And again, on page 209, section 929: "An injunction will be granted where timber is attempted to be cut down by a trespasser in collusion with the tenant of the land; also, where there is a dispute about the boundaries of estates, and one of the claimants is about to cut down ornamental or timber trees in the disputed territory. In short, it is now

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An injunction may properly be granted against a corporation to prevent an abuse of its authority: (2 *Story's Eq.*, 927, 928, and 929.)

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granted in all cases of timbers, coals, ores and quarries where the party is a mere trespasser, or when he exceeds the limited rights with which he is clothed."

But, conceding that this proceeding in equity as against a private person, would fail for want of jurisdiction, because it is not alleged or shown that the anticipated trespass would, if not prevented, produce *irreparable injury* to complainant's property, yet, this suit is against a *municipal corporation*, and the power of Courts of equity to prevent, by injunction, corporations from trespassing on private property, cannot be questioned.

The jurisdiction attaches, moreover, upon the ground before assumed, that the complainant has a right to have his legal title quieted, and to have the interruption or disturbance of his peaceable possession of the land by defendants, prevented by the interposition of the power of a Court of equity; and it seems that such interposition in this and similar cases would be peculiarly appropriate; because it appears from the evidence in this cause, if the Trustees and their Marshal were permitted to exercise the power and authority claimed by them to tear down enclosures, because they may form an *ex parte* decision, that they obstruct the streets and alleys of the town, they may, upon the same pretext, and upon the same reason and ground of authority, tear down the dwellings of the people, and valuable private edifices belonging to the citizens, and if so, then, as it appears from the proof and the notes of the survey as made by the surveyor and reported by the commissioner in this case, that there are large brick buildings belonging to some of the citizens, and also numerous enclosed lots, which stand upon and include portions of other and various streets in the town. The Trustees and their Marshal although at present, they may intend only to tear down Dudley's enclosure as an obstruction of Mero street, may hereafter, if allowed to establish their power by a single precedent, conclude to tear down the buildings and enclosures of others

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which, according to their showing, stand upon and include, and consequently obstruct other streets more important than Mero. Even if the present board should exercise this power with moderation and discontinue their operations after having torn down the enclosure, and contracted the dimensions of Dudley's lots, their successors might not be so moderately disposed, and following the example set them by their predecessors, they might make a similar order authorizing their Marshal under the direction of their street committee, to demolish the brick houses which stand more or less as they may suppose upon the other streets of the town.

If the private citizens at any time encroach with their buildings and enclosures upon the public streets, the municipal authorities should, in the exercise of proper vigilance, and of their undoubted authority, interpose by the legal means provided in their charter, to prevent such encroachment in *due time*, and thus preserve for public use, the squares, streets and alleys, of the town, in their original dimensions; but if a private, individual or citizen has been permitted to remain in the continued adverse actual possession of public ground, or of a public street, or part of a street, as embraced within his enclosures, or covered by his dwelling or his other buildings, for a period of twenty years or more without interruption, such citizen will be vested thereby with the complete title to the ground so actually occupied by him, and a title thus perfected by time, will be just as available against a municipal corporation as it would be against an individual whose elder title and right of entry may be barred by a continued adverse possession, for twenty years, of his land; a municipal corporation, or any other artificial body vested with corporate rights and functions have no more right than a natural man to claim the benefit and advantage of the maxim "*nullum tempus occurrit regi.*"

After a possession of fifty years of land, with claim of title and ownership even a grant from the State has been presumed. So an adverse actual possession of

If a private citizen take & hold peaceably a street or alley in a town and hold it claiming it as his own for 50 years, the complete title is vested in such citizen, or those holding under him—and if the right is questioned may maintain his bill to quiet his possession.

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twenty years will bar the title of the trustees of towns to their streets and alleys, just as effectually as it would bar the superior title of an individual claimant to his land.

There is no certain or unerring proof in the cause as to the precise position and lines of the streets in Frankfort. There is no approved plat or diagram of the town exhibited in the record, showing its general plan.

In any view presented by the evidence, it is clear that Dudley has been in the continued adverse possession of ground enclosed for more than twenty years before this suit was brought, which the defendants claim, and which their officer, by their direction, intended to take possession of forcibly. It is the opinion of this Court that Dudley has a right to have his title and possession quieted as to all the block of ground or group of lots situate between Mero, Washington, and St. Clair streets, and the town limits of which he has had continued adverse possession for twenty years and upwards, even though his possession does embrace and cover a part of all, or either of the surrounding streets, and the extent of this possession should be ascertained by proof. It is clear that the trustees claim to run the north boundary line of Mero street, so as to turn a part of Dudley's lots into that street, of which he has had possession for more than thirty years. If Dudley's present enclosure on Mero street has stood for more than twenty years before this suit was brought on its present site, then his title and possession should be quieted as to all the ground which they (the trustees) pretend to claim within that enclosure. If, however, Dudley has moved out his fence on Mero street within twenty years next preceding the institution of this suit, so as to include a part of the said street, the trustees should only be required to surrender to him so much of the ground, claimed by them as part of said street; as lies within the line which formed the site of the fence which enclosed the lots twenty years before this suit was brought. The proof does not show at

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what time the present fence on Mero street was built, but it does show that an old worm fence, which enclosed the lots on the side of Mero street at least thirty years ago, included a strip of ground several feet in width, and extending along the entire front of the block of lots, which the defendants claim as being part of the street. To this extent, at least, complainant's title and possession should be quieted, and his injunction against defendants perpetuated.

Wherefore the decree of the Circuit Court is reversed and the cause remanded for further proceedings to be had, and for final decree to be rendered in conformity with this opinion.

Hewitt for appellant; *Harlan* for appellees.

Orndorff vs Hummer.

APPEAL FROM THE LOGAN CIRCUIT.

Wills. Attestation thereof.

JUDGE MARSHALL delivered the opinion of the Court.

THE County Court of Logan, having rejected a paper offered for probate as the will of John Orndorff, the case was taken to the Logan Circuit Court, by writ of error, and the judge of that Court, having upon the evidence adduced by the parties, decided that paper was the valid will of said Orndorff, the case is before this Court, for revision upon the evidence before the Circuit Court, as presented by a bill of exceptions.

The validity of the will is opposed on the grounds, first, that the testator was incompetent to make a will when this paper was written and attested, and secondly that

WILL CASE.

Case 110.

January 22.

Case stated.

One named as executor is a competent witness to prove the will, and is so

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in all cases unless he receive under the will other and greater interest than an ordinary trustee, who receives a commission for his services. The possibility that he may abuse his trust will not disqualify him from proving the will.

the requisitions of the statute with regard to the attestation and subscription by the witnesses has not been complied with. There is however, a preliminary question with respect to the competency of William Morgan, who was admitted to testify in favor of the will. He was the draftsman of the paper, was named as one of two executors, was the brother-in-law of the testator neighbor and friend, had been long in habits of intimacy with him, and is proved to have been worthy of full and entire credit. His competency is denied not on the ground that he was named as executor which is admitted to be insufficient, but on the ground that by the will the executors are vested with such powers and interest, and will have such opportunity of making money for themselves out of a large estate, as creates an interest in the establishment of the will which should render them incompetent to testify in support of it.

The testator possessed a large estate in land, slaves and personality, one portion of which he devised to his wife, during life or widowhood, and the residue to his daughter then of tender years, to be delivered to her at the age of twenty-one years. In the meantime the executors were to retain and manage it, to lend out the money, and take mortgages, but not to be responsible for interest on any *residuum* which might remain in their hands, and to have a discretion in lending or not lending money. And in the last clause the testator provides if his daughter should die, leaving no lawful heir of her body, all his negroes should be free, and that his executors should retain \$500, in their hands to carry the same into effect. And the County Court is desired not to require security from them.

We are of opinion that there is nothing in any of these provisions which authorizes the executors to use a single dollar of the estate, but they are responsible for their management of every portion of it, and that as the direct requisition that they shall retain the estate and lend out the money until the devisee attains full age, would subject them to more than ordinary

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responsibility and loss, the provision that they should not be responsible for any *residuum* remaining in their hands is nothing more than the assertion of an equitable principle for their safety, which the chancellor, if satisfied that they acted faithfully would apply, though it were not expressed in the will. The discretion given with respect to lending or not, is also merely conservative, to be exercised not with a view to their own profit, but with a view to the benefit of the estate and the faithful and convenient discharge of their duties under a trust which requires them to loan the money, when it can be done safely and without such trouble or inconvenience, as would be unreasonably onerous. For any abuse of this trust, or for inexcusable neglect they would be held to strict accountability by the chancellor, who even if they should give no security in the County Court, might for good cause require it from them, or might take the trust out of their hands. The clause with respect to the \$500, does not put that sum out of the trust, nor authorize its use by the executors for their own benefit, but merely authorizes them to retain and apply that sum to the particular purpose designated.

Under this view of the will and of the rights and duties of the executors under it, we are of opinion that they have no other interest than that which ordinary executors or other trustees who are to receive a commission have in the establishment of the trust. And however this interest may operate with respect to the competency of other trustees, it has been often decided and is the established doctrine in this Court, that one named as executor, is not on that ground alone, incompetent to testify in support of the will. Any trustee may abuse his trust and attempt to pervert his powers to his own advantage, but the possibility that he may do so, or the opportunity afforded for his doing it in a particular case, cannot affect the question of his competency as a witness, however it may, with other circumstances affect his credit.

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Morgan then, was properly decided to be a competent witness, and his testimony corroborated by that of another witness who was present when the will was dictated, written, read over to the testator, and signed by him in their presence, and supported also by the general statements of others, leaves no room to doubt that John Orndorf, though much enfeebled by the disease of which on the second day afterwards he died, and though about the time he was generally in a comatose state, did, in fact, dictate the entire will, first by a general statement of the intended disposition of his estate, and afterwards in detached portions as the minutes of each clause were read over to him. And afterwards when the will was drawn out from the minutes, noticed omissions, and directed additions in such a manner as to prove incontestibly that his attention and thoughts were fully awake, that his mind was active on the subject, that he understood perfectly what he was saying and doing, that the dispositions which he dictated were the results of his own will and judgment, and that the paper which he thus dictated and signed did in fact contain his will. That he did dictate it in the manner and under the circumstances stated, proves that he was capable of taking an intelligent survey of his affairs and of his duties, and of expressing his wishes and intentions with respect to them.

Though the testator well understand what he is doing, the will written according to his intention distinctly read to and sanctioned by him, & signed.

The witnesses all concur in saying that although his mind may have been and as some say, was enfeebled by disease, there was no aberration or wandering of the intellect. And upon comparison of the whole testimony we think it clear that although he generally lays with his eyes closed, and as the physicians say, in a comatose state, he was easily ordered and capable instantaneously of comprehending and thinking of the subject on which he was addressed. And although the two attending physicians who subscribed the will as witnesses, but who were not present when it was written or read over and signed, express the opinion of that he was not in a condition to make a will, or at least entertained doubts

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on the subject, we cannot resist the conclusion upon the whole evidence, that he was in fact capable and did in fact dictate and approve as he most certainly did sign the will as written. So far therefore, as the question of probate depends upon capacity alone, we should decide in favor of the will, as being the valid will of John Orndorf, dictated and signed understandingly by him when he was competent to make a will.

But with respect to lands and slaves, something more is requisite. The statute of 1797, concerning wills, &c., (*Statute law*, 1537,) prescribes with respect to wills of land, not only that they shall be signed by the testator, or by his authority, but that, unless written wholly by himself, "they shall be attested by two or more competent witnesses *subscribing their names in his presence.*" This will was as we have seen signed by the testator himself, which he affected by raising and supporting himself, or being raised and supported on one arm in his bed, while with the other hand he subscribed his name three times on the paper which was laid on a book in his lap. Exhausted, doubtless, by the effort of dictating and signing the will, he relapsed into sleep or coma, and so continued for some hours, when, at the suggestion of Morgan, the two physicians and a third person then in the house, were brought into the room to witness the will. They of course approached the bed where Orndorf lay, and while one of the physicians held the will in his hand, Morgain said, in an elevated tone, "your *will*, Captain"—Orndorf being somewhat deaf—when Orndorf immediately opened his eyes, and said, "I acknowledge it," or "I acknowledge that, gentlemen," and immediately closed his eyes in seeming sleep, or as the physicians say, relapsed into coma.

They express the opinion too, that he would have acknowledged any other paper thus presented as readily as the will, and this is probably true. Still as this was undoubtedly the paper signed by him as his will, and which he desired to have attested as such, we

Yet if not attested by two or more witnesses in his presence, it will not pass lands and slaves: (*Stat. law*, 1537.) Held that though the will be acknowledged by the testator before the witnesses, yet if the attestation of the witnesses be not in view of the testator or where he might see without being assisted to do so, it is invalid to pass land slaves though the attestation be in the same room: (*Neil vs Neil*, &c., (1 *Leigh's Rep.*, 1.)

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should deem this a sufficient acknowledgement, if the precise requisitions of the statute were followed in the remaining formalities, and especially as it may be assumed that the sick man understood perfectly that he was acknowledging a will, and as it cannot be assumed with certainty that he did not notice the paper sufficiently to be satisfied that it was the true one which he had signed.

But it seems that after this acknowledgment by the testator, and as we suppose, after he had closed his eyes, as the witnesses say he did immediately, they went to the table on which the will had been written, which had stood, for the benefit of light from a window, just behind the head of the lounge in which the sick man lay, in the middle of the room, and the table having been so removed as to be between four and five feet from the lounge—the three witnesses, some of them being between the table and the bed, subscribed their names as witnesses to the will. The head-board of the lounge intervened between the testator and the table, so that at the moment of the subscription by the witnesses, he could not, as he lay in the bed, see the table, and probably not even see the witnesses; and it is doubtful whether if awake he could have changed his position, without assistance, so as to have seen them. And the question is made whether this was a subscription in the presence of the testator. This requisition of the statute was intended to secure to the testator the means or opportunity of knowing that a false will is not substituted for a true one, and that his will is witnessed by the persons whom he has chosen for the purpose. But it has never been held that it was necessary that he should actually see either the will or the witnesses when the attesting clause was subscribed, it is sufficient that he might see them if he had desired to do so. And as this will was subscribed in the same room in which the testator lay, and therefore actually in his presence, the question is first, whether, if he had desired to see, he might not, without any extrinsic

aid, have placed himself in a position in which he could and would have seen what was going on, which is a question of fact; and secondly, whether, even if he could not have done this without the aid of others, it is not to be assumed unless the contrary is shown, that he might have had that aid if he desired it, and therefore that he might have seen what was going on, if he had wished to see it.

When the subscription takes place in a different room from that in which the testator lies in bed, it is not actually and in common parlance done in his presence. But if it is actually in his view, or perhaps if by such change of position as he himself could make in his bed, he could see it, and in one case even when the testatrix was in her carriage, and might have seen the witnesses subscribe in a scrivener's office through an open window, this, in support of a fair will, has been held to be sufficient in the presence of the testator to answer the objects of the statute. But this is a constructive and not an actual presence. And to say in such a case that the subscription, though done out of the room in which the testator was, and therefore not actually in his presence, might be considered as done in his presence—if by the aid of others he might have seen it, might sanction a subscription in another room, with the door shut between them, because the testator might have it opened if he desired it. There must, therefore, be some limit to the doctrine of constructive presence. And the requisition that if the subscription be not in the same room in which the testator lies, it must be clearly in view, so that by the exertion of his own volition and his own physical power, he may, by a mere change of position in the bed, see it if he will, is a sufficiently liberal, and perhaps too liberal a stretch of the constructive presence, which will meet the objects of the statute. It would be a safe, and is perhaps the true doctrine to say, that in such cases the position of the witnesses in subscribing the will should be such that the testator might see the will and the witnesses by

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merely looking in that direction. For if he could not see them thus easily, he might not know which way to turn, or whether any effort would be effectual. And it is to be recollected that so far as presence is intended to enable the testator to identify the paper which is subscribed as his will, distance is a most important element in the question.

When the subscription takes place in the same room in which the testator is, and within a few feet of him, it is actually in his presence. The terms of the statute are literally complied with, and *prima facie* the subscription is in the presence of the testator within all the purposes of the statute. But circumstances may exist which show that some of the objects of the statute have been defeated. And the difference between a case where the subscription is in the same, and one where it is in a different room, consists in the fact that in the latter case it is necessary to prove circumstances which constitute a virtual or constructive presence, and thus bring the subscription substantially within the requisition and object of the statute, while in the former case, it is necessary in order to invalidate the subscription that circumstances should be proved, which show that although there was actual presence there, was for the purposes of the statute, virtual absence. And such as we think is the current of authority on the subject departed from so far as we have seen only in the case of *Neil vs Neil, etc.*, (1, *Leigh's Rep.*, 1,) in which three judges against two decided that it was necessary even where the subscription was in the same room with the testator, that he must have had the physical power of himself to make such change of position in his bed as would enable him to see the act of subscription if he wished to see it. This was, it seems to us, applying the same tests to a subscription in the same room, as would be necessary to the validity of a subscription in a different room, which, under the view that we have taken of the subject, is not necessary or proper. We refer to the case of *Neil vs Neil* as containing a full statement and review of the authorities.

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Signed the will
by the witnesses
must be in pres-
ence of the tes-
tator: 6 *Monroe*,
202, 3 *Salk.*, 396
1 *Pr. Wms.*,
741. *Longford's*
Rep., 241.

In the case of *Alsey Howard's will*, (5, *Monroe*, 202,) this Court says, that an attestation in the same room with the testatrix is a sufficient subscription in her presence, is well settled by adjudged cases; to several of which reference is made in *Davy vs Smith*, (3d *Salk.*, 395,) the Court say, "if the witness subscribe in the same room where the testator lies, though the curtains of his bed be closed, it is good under the statute, because it is in his power to see them; and what is done shall be construed to be in his presence." In *Longford vs Eyre*, (1, *P. Williams*, 741,) Lord Chancellor Maclesfield said, "the bare subscribing by the witnesses in the same room, did not necessarily imply it to be in the testator's presence, for it might be in a corner of the room in a clandestine fraudulent way;" but that here, it being sworn by the witness that he subscribed the will at the request of the testatrix, and in the same room, this could not be fraudulent, and therefore well enough. And as the circumstances here preclude all supposition that there was fraud in the subscription of the will, and as there were those present who it must be presumed would have given the testator any aid he required, or have moved the table to his bed side, we conclude that whether he was able or not by the exertion of his own physical power to see the act of subscribing, as it was done in the same room, without any effort at concealment, it was a sufficient subscription, if the testator was then conscious of what was going on.

But although so far as mere space was concerned, the subscription was in his presence, we are satisfied that the same reasons which require that he should have been physically capable by his own exertion or by the aid of others to see what was going on if he chose to do so, operate even more powerfully to require that he should have been conscious of it, and that he should have had the will or mental power to determine whether he would or not see it. If this be not requisite the subscription by the witnesses would be sufficient, though

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made after the death of the testator, or after he had relapsed into perfect delirium, or had become wholly insensible to external objects from the near approach of death. And if this were sufficient, the objects of the statute would be as fully accomplished if the will were subscribed a year after the testator's death, or at any distance from his presence during his life. If authority were necessary on this subject, it may be found in *Right vs Price*, (*Doug. Rep.*, 241.)

When the condition of a testator is such, and immediately after signing the will, and before the subscription by the witnesses, from sleep or other cause, he becomes insensible to what is passing around him, and unconscious of the act of subscribing, which he has a right to supervise & is in fact unable to determine whether he will or will not supervise it, the attestation is not in the sense of the statute made in his presence, and the will is not valid to pass land and slaves.

But we consider the proposition too obvious to require reasoning or authority in its support, that when the condition of the testator is such, that immediately after the acknowledgment, and before the subscription of the will, from sleep or other cause he becomes insensible to what is passing around him and unconscious of the act of subscribing, which he has a right to supervise, and thus in fact, is unable to determine whether he will or will not supervise it, the subscription then made is not in the sense or within the objects of the statute made in his presence. And as upon the evidence in this case we are bound to assume that the testator Orndorf was in this situation when the witnesses subscribed his will, we conclude that the subscription was not sufficient under the statute, and therefore that the will should not and cannot be established as a will of land, and as a will of slaves requires the same solemnities as are prescribed for a will of land, this is not a valid will as to either, and should not have been established or admitted to record without qualification.

But a will of personalty is not subject to the requisitions of the statute which has been referred to, nor of any other, unless it be merely verbal or nuncupative. And so far as the personal estate of John Orndorf, is concerned including the appointment of executors, the proof is amply sufficient to establish the will and to authorize its admission to record as a will of personalty. And that it may be so far established as a nuncupative will, or as a written will not formally executed or attested, is well established, *Ofutt vs Ofutt*;

(3 B. Mon. 162,) and as such, it should have been admitted to record as a valid will.

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&c.

Wherefore, the order or judgment of the Circuit Court establishing this will, and admitting it to record without qualification is reversed and the cause remanded, with directions to admit it to record in the Circuit Court, and also in the County Court, as a will of personalty, but insufficient as a will of land or slaves.

The costs of this Court to be divided.

W. L. Underwood, for appellant; *Bristow*, for appellee.

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Grigsby and wife vs Breckinridge, &c.

CHANCERY.

ERROR TO THE FAYETTE CIRCUIT.

Case 111.

Devises. Descents. Remainders.

January 24.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

Case stated.

The questions involved in the determination of this case, depend upon the construction that shall be given to some of the devises contained in the will of Alfred Shelby, deceased. This will, as it respects some of its provisions, has been heretofore construed by this Court. (1, *Ben. Monroe*, 266.) But events which have since transpired, have created a new state of case, and given rise to new and undecided questions among the parties now interested.

Alfred Shelby had four children, two of whom only, viz; Isaac and Susan, had been born at the time he executed his will. By the first clause in his will, he loaned to his wife all his lands, negroes, stock, &c., until the expiration of the minority of his eldest son, or her marriage again.

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&c.

By the second clause, he devised to his son Isaac, on his arriving at age, the farm, (Traveller's Rest,) with all the lands appertaining to it; also, six of the choice of his negroes, and an equal half of all the others under fifty years of age, &c.

In the fourth clause he bequeathed to his son one thousand dollars on his arriving at age to purchase stock for his farm.

The testator died in December, 1832. Sarah, one of his children, born after the execution of his will, and who inherited part of his estate, being pretermitted in the will, died when she was quite young. Her brothers, Isaac and Alfred, and her sister Susan, inherited from her, in equal portions, the land which had descended to her from her father. Her slaves and personalty were distributed among her brothers, sister, and mother.

In April, 1847, during Isaac's minority, his mother intermarried with Robert J. Breckenridge. Virginia Breckenridge is the offspring of this intermarriage, and was born on the 10th day of February, 1848. On the 24th of the same month, her half brother, Alfred Shelby, departed this life, an infant, unmarried and intestate, leaving his half sister, Virginia Breckenridge, then a few days old, and his brother and sister of the full blood and his mother, the heirs and distributees of his estate in equal portions. Isaac Shelby, the oldest son of Alfred Shelby also died in December, 1848, during his minority, intestate and without issue, leaving his mother and his two sisters one of half, and the other of full blood, his heirs and distributees.

This suit was instituted in the name of Virginia Breckenridge, the half sister, by her next friend, John C. Breckenridge, to which her father and mother and half sister, Susan Shelby, were made parties. The object of the suit was, to settle and define the rights of the parties in the estate, in its present changed condition, resulting from the death of the two brothers, Alfred and Isaac Shelby. During the pendency of the suit, Susan Shelby intermarried with J. W. Grigaby, who was made a defendant.

In the answer filed for Susan by her *guardian ad litem*, whilst she was an infant, and before her marriage, the position was assumed that she is entitled to all the real estate that belonged to her father, and to which her deceased brothers and sister had title from him, either by devise or descent, and that her half sister, Virginia, is not legally entitled to any part of it. This position, however, cannot be maintained.

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&c.

The clause of Virginia Grigsby asserted in her answer.

It was decided in the case of *Clay &c. vs Cousins &c.*, (1, *Monroe*, 75,) and such has been the received and settled construction of the statute of descents since that time, that where an infant having title to real estate derived from the father dies without issue, that half brothers or sisters by the mother will inherit the estate as heirs of the infant. The right, therefore, of the complainant to a portion of the estate that belonged to her half brothers at the time of their death, is clear and incontestible.

Where an infant having title to real estate dies without issue, half brothers or sisters by the mother will inherit the estate as heirs of the infant: (*Clay, &c. vs Cousins, &c.* (1 *Monroe*, 75.)

But the principal question to be considered, and the one that involves the construction of the will of Alfred Shelby is, what estate did in fact belong to Isaac at the time of his death? Did he take a vested estate under his father's will in the tract of land and slaves devised to him, or did his estate consist only of that which had descended to him from his deceased brothers, and from his father, as one of his heirs?

It is contended that the devise of the farm (Traveler's Rest) and the slaves to him, on his arriving at age, was a contingent devise, and took effect only in the event that he lived until that time, and having died previously, that nothing passed to him by the devise.

When expressions relating to a future period are introduced into a devise, the question naturally arises whether they are inserted for the purpose of postponing the vesting, or are intended merely to indicate that the possession or enjoyment is to be deferred until the time designated. The solution of this question in every case must depend upon the intention of the testator deducible from considerations arising on the face of

The intention of the testator as to the time when a legacy is to vest, is the rule by which to determine when it vests—to be determined by the terms used and the rules established by adjudications or the construing of devises.

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&c.

A devise was made to the wife until the son arrive at 21 years old, then to him absolutely, or if the mother marry then her interest to cease without any devise over in case of the death of the son or the marriage of the mother before the sons arrival at 21. Held that the son took a vested interest.

the will; and the legal exposition and effect of similar devises according to the adjudged cases and settled rules of construction upon the subject.

The whole will, so far as it relates expressly to the farm (Traveller's Rest) and the slaves, presents the case of a devise to the mother, until the son attains the age of twenty-one, and to him absolutely at that period. No other disposition is made of it, nor does the will contain any expression indicating an intention to protract the vesting of the estate to any future period beyond the death of the testator. The interest of the mother, in the event of her marriage, was to determine before the period designated at which the son was to enter into the enjoyment of the property, but no other disposition of the farm was made upon the happening of that contingency. It is evident that the testator regarded it as having been devised to the son, and as belonging to him, but as he would not be capable of managing it during his minority, the use of it was given to his mother until his minority terminated, if she remained unmarried. Provision also was made for the support and education of the son until that time, and when it arrived, he was to have one thousand dollars to purchase stock for *his farm*. Thus demonstrating clearly that according to the intention and understanding of the testator, the farm was devised to him absolutely and unconditionally. It is evident that the testator did not contemplate the event referred to; that is, the arrival of the son at majority, as uncertain and contingent, but seems to have regarded it as one that would naturally and certainly occur, for if he had regarded it as doubtful, it can hardly be supposed he would have failed to make some devise over, upon the event not happening, especially as it may be presumed that he did not intend to die intestate as to any part of his estate, inasmuch as he seems to have disposed of the whole of it in his will. He did not say, *if his son* arrived at age he was to have the farm, or use language clearly importing a contingency, but devised it to him

on his arriving at age, thus speaking of it as an event that would certainly happen.

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&c.

The doctrine is well settled, that when a devise is made in words that are apparently creative of a future estate, and that even import a contingency, such words, if a prior interest has been carved out of the estate, will be construed as referring merely to the futurity of possession occasioned by the carving out of a prior interest, and as pointing out the determination of that interest, and not as designed to protract the vesting. The cases that fall within this class are collected and stated at length, in (*Ferne on remainders*, 242 to 246,) and are, together with some others, referred to in the case of *Danforth vs Talbot's Administrator*, (7, Ben. Monroe, (23).)

Though a devise be made in words that apparently create a future estate, and seem to import a contingency, such words, if a prior interest has been carved out of the estate, will be construed merely as referring to the futurity of possession occasioned by the carving out of the particular interest, & not to protract the vesting of the estate: *Ferne on Rem.*, 242 to 246 (7 B. Monroe, 623.)

According to this doctrine, as a prior interest had been carved out of the estate and given to the mother which might continue until the time designated for the son to have the possession, the designation of that time must be regarded as having been made to point out the determination of the prior interest and as referring merely to the futurity of the possession.

It is contended, however, that as the prior interest, by the marriage of the mother, might determine before the period referred to, that this case does not come within the principle settled in the cases above mentioned, and that as the particular estate to the mother might be determined before the remainder to the son was to take effect, the latter might fail for the want of a particular estate to support it, and was consequently contingent.

A remainder may be valid to take effect upon the determination of a particular estate, the particular estate may be made to determine upon any event, and the remainder then to be enjoyed: (*Coke Litt.*, 298. *Ferne on Rem.*, 308.)

One defect in the argument consists in the assumption that the estate devised to the son was strictly a remainder. It was in effect a devise of the whole estate to the son, subject merely to an interest, taken out of it by the testator, and applied to the use of the mother. In such cases, the expressions connected with the devise of the estate relating to a future period or event, are construed merely as pointing out the deter-

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mination of the prior interest, and the commencement of the possession of the devisee and are deemed to have been used for that purpose only, by the testator and not to postpone the vesting of the estate. This construction prevails, because it is supposed to be consistent with the intention of the testator. Is not his intention as strongly evinced, where the interest he has carved out of the estate may continue, as where it must necessarily continue until the time referred to? In both cases he evidently, by using words apparently creating a future estate, alludes to the futurity of possession and enjoyment to take effect, in the one case, at the time the prior interest may, and in the other, when it must cease and determine. He does not mean that the estate shall not vest until the prior interest determines, but that it shall vest subject to that prior interest which he has carved out of it, and take effect in enjoyment upon the event referred to, which, according to the manner in which the subject has been viewed by him, he contemplates as the period when the prior interest will end.

If, however, the estate devised to the son were to be regarded as a technical legal remainder, after the expiration of the particular estate given to the mother, it would still be a valid remainder and one that vested immediately upon the death of the testator. The particular estate to the mother was to continue during the minority of the son, unless the mother chose to terminate it sooner by her marriage. Upon the death of the testator, by the provisions of his will, the mother took a defeasible estate, during the minority of her son, remainder to the son in fee. Now, when a vested remainder rests upon good title, and not upon the defeasible title of the particular estate, it will remain valid, though the particular estate be defeated: as in the case put by Coke of a lease to an infant for life, remainder to B in fee; though the infant disagree to the estate for life when he comes of age, yet the remainder shall stand, having once been vested by a good title. (Ca.

Litt. 293, a.) So in the cases stated in *Fearne on remainders*, page 308, as instances of vested remainders taking effect, though the preceding estate be defeated. As if a lease be made to A, for the life of B, the remainder to C in fee; A, dieth before B, now, (at common law,) before the entry of an occupant, there was no particular estate, and yet the remainder continued good. So in the present case, though the mother might, by marrying, defeat the particular estate which was given to her by the will during the son's minority, upon the condition she remained unmarried, yet as the remainder would vest in the son before her marriage, and he would thereby acquire a good title, his title would continue good, notwithstanding his mother, by marrying defeated and determined the particular estate given to herself.

But we put the case upon the broad ground that the son took a vested estate in the property devised to him in the second clause of the will, according to the manifest intention of the testator, ascertained as well by a reference to the particular language used, and the general provisions of the will, as to those well settled principles of construction, which have been adopted and applied in similar cases. And that the words used in limiting the estate, or the remainder if it may be so termed to the son, which seem to import a contingency were not used for that purpose, but only to denote the time when the remainder was to vest in possession, and did not amount to a condition precedent, or make his right to the estate devised, depend upon his living to the age of twenty-one. It was in effect a devise of the whole estate *instantly* to the son, with the exception of a partial interest carved out of it, and which extended (subject, however, to a defeasance) over the whole period for which the enjoyment of the devise to the son was postponed.

As the testator provided for the support and education of his son during his minority, and fixed definitely the period at which he was to have the possession and

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enjoyment of the estate devised to him, and made no disposition of the rents and hires in the event of the previous determination of the prior interest that might accrue in the interval between the cessation of one estate and the commencement of the other in possession, such rents and hires constituted a portion of his estate in the hands of his executors, subject to distribution as in the case of intestacy; especially as it may be presumed that as the testator provided for the determination of the interest of the mother upon the contingency of her marriage, he would, if such had been his intention and desire, direct that the estate devised to the son should, upon the happening of that event, pass immediately into his possession. They do not, however, seem to have been distributed in this manner by the Court below; but Grigsby and wife have no reason to complain of the distribution directed to be made, as they obtain thereby a larger portion of the fund than they would if it were correctly distributed.

A legacy of \$1000 to be paid to the son on his arrival at 21 years of age to purchase stock for his farm, the son died before 21. Held that the legacy was contingent and never vested.

We are inclined to the opinion that the legacy of one thousand dollars bequeathed to Isaac, on his arriving at age, was, according to the settled rules upon the subject a contingent and not a vested legacy. The terms in which the bequest were made, and the object to which the money was to be applied, also seem to favor such a construction. It was given to the legatee on his arriving at age, to purchase stock for his farm. If he died during his minority, it could not be thus applied; and the object of the bequest would fail entirely. But it is not material, whether it be a contingent or a vested remainder, for as it was held to be a vested remainder, by the Court below, and as that decision is to the advantage of the plaintiff's in error, they ought not to complain of it.

Though the mother is not entitled to any part of land descended to her children from their father yet she is entit.

Although the mother was not entitled to any part of the real estate belonging to her deceased children, to which they had derived title from their father, yet she had a right to a share in that part of it, which they had inherited from each other, upon the death of either;

she being excluded only where the estate came immediately from the *father himself*: *Duncan vs Laferty's administrator*, (6 *J. J. Marshall*, 47.) As to the slaves and personalty, she was not excluded, but was entitled to a share with the other distributees.

The estate, except the legacy to Isaac, and the rents of the land and hires of the slaves accruing, after the marriage of Mrs. Breckinridge, and before Isaac's majority, has been disposed of by the decree of the Circuit Court, consistently with the principles herein settled. And there is no error, to the prejudice of Grigsby and wife, in the manner in which said legacy, and rents and hires have been disposed of.

Wherefore, there being no error in the decree of the Court below, to the prejudice of the plaintiff's in error it is affirmed.

Harlan, and C. S. Morehead, for plaintiff's; *Robertson*, for Mrs. Breckinridge; *Robinson and Johnson*, for Miss Breckinridge.

CARROLL'S HEIRS

VS

CARROLL'S HEIRS

itled to parts of that which they inherit from each other, though originally inherited from the latter: (6 *J. J. Marshall*, 47.)

Carroll's heirs vs Carroll's heirs.

CHANCERY.

ERROR TO THE JESSAMINE CIRCUIT.

Case 112.

Devises. Wills, Construction of.

January 27.

CHIEF JUSTICE SIMPSON delivered the opinion of the Court.

Case stated.

John Carroll, at the time of his death, was the owner of a small tract of land, several slaves, and some personal estate, the whole of which he devised to his wife. She enjoyed the property during her life, and at her death made a nuncupative will, in which, with some unimportant exceptions, she devised her whole estate

GARROLL'S ESTATE vs GARROLL'S ESTATE to the legatees of her husband, to be divided among them according to the directions of his will.

John Carroll had several children by a previous marriage, but none by his last wife, to whom he devised all of his estate. She died without ever having had issue, leaving her brothers and sisters, and the descendants of such of them as were dead, her heirs at law. As the land and slaves devised to her by her husband did not pass by her nuncupative will, they are claimed by her brothers and sisters. They are also claimed by the children of the testator under his will, who contend that the testator's wife took only an estate for life in them. These conflicting claims gave rise to the present controversy; the result of which depends exclusively upon the legal effect and operation of the will of John Carroll, which, so far as it is material to the matter in contest, reads as follows:

"I give and bequeath to my beloved wife, Priscilla Carroll, the land on which I now live, and all other land I now have or may have hereafter; also, all my slaves, stock of all kinds, farming utensils of all descriptions, household and kitchen furniture, including all my estate, both real and personal. But should she and my executors, hereafter named, see proper to dispose of any part of any kind, they are at liberty to do so, and apply the proceeds thereof amongst my children or legatees hereafter named as may seem to them just and equitable, according to the following manner: I give to the children of my daughter Polly Creekbaum, as one legatee, they being first charged with seventy-seven dollars, being the amount given to her by me in her lifetime."

The will proceeds in the same manner to point out which of his children the estate shall be given to, and how much each one is to be charged with, on account of advances previously made.

The testator subsequently made a condicil, or as he termed it, an appendage to his will, that reads as follows:

"It is my desire, in addition to what is bequeathed to my wife, that she and my executor is hereby authorized to sell and dispose of any of my real and personal estate, they may think proper, and that my wife have as much of the proceeds of such sale as she may desire for her own use and benefit, and the overplus, if any, to be applied in manner as I have directed in the first part of the will on that subject."

CARROLL'S W'S

CARROLL'S W'S

It is manifest from these provisions, the testator intended to give, and supposed he had given to his wife only an estate for life. In the body of the will he authorized her, in conjunction with the executor, if they thought proper to do so, to sell any of the property devised, but they were required to distribute the proceeds of the sale "among his children or legatees," in the manner he prescribed. Such a limitation upon her power over the estate devised, is inconsistent with the idea, that he intended it to belong to her absolutely. She was to have it as long as she lived, and enjoy it in kind, but if she sold any of it, the part so sold, she was not to retain any longer, but it was to pass immediately to the legatees. That the testator understood this to be the effect of his will as it was first written, is evident from the contents of the codicil, which was made to enlarge the estate previously given to his wife, or in the language used by him, to authorize her, in "addition to what is bequeathed" to her, in conjunction with the executor, to sell any part of the property, and apply so much of the proceeds to her own use as she may desire, and the overplus, if any, in the manner prescribed in the first part of the will. If the property had been devised to her absolutely and in fee, the codicil was wholly unnecessary. She would have had a right in that case to dispose of the property as she pleased, and the testator must have known it. He considered the limitation he had put upon her right to use it for her life in kind, as too restricted, and therefore authorized her, with the assent of the executor, to convert part of it into money if she desired to do so for her

CARROLL'S H'S own use, without being under obligations to pay the
 CARROLL'S H'S²³ sale money over to the legatees.

But it is contended that the authority contained in the codicil to sell and dispose of the property for her own benefit as she might think proper, vested in her the absolute right to the estate devised, as it virtually placed it in her power to have made it her own by its conversion into money. It may be conceded that in the case of a gift to a person indefinitely, with a power superadded to dispose of the property, the legatee would hold the property as his own absolutely. But there is a very material distinction between the present case, and one of that kind. Here the devisee was first given the authority to sell merely; and her power over the disposition of the proceeds of the sale when made, was regulated, and limited by the provisions of the will. The power was enlarged by the codicil so as to authorize her to apply the proceeds of the sale, when made, to her own use, so far as she desired to use them; the balance, however, she was to pay over to the legatees of the testator. She was not vested with a general power to dispose of the property at her discretion she could dispose of it in one mode only. She might sell and use as much of the sale money as was necessary, or as she desired, but the residue she was to apply according to the requisitions of the will. The testator obviously intended that the power conferred should be exercised alone for her own personal use and the benefit of his children, and not in such a manner as to enable her to dispose of the property as she pleased. Besides the power to sell was not given to her alone, but to her and the executor jointly. Without the assent of the latter, she could make no disposition whatever of the property. He was the trustee of all the devisees under the will, and it was his duty to see that the intention of the testator was not frustrated, but carried into effect. Any right that she acquired under the codicil was conditional, depending upon a sale of the property, by the joint concur-

rence of her and the executor, and no such sale having been made, the estate devised must pass by the will in the same manner it would have done, if no such power had been conferred.

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OF
CARROLL'S H'S

No principle was more fairly established by the common law than that a devise of real estate without words of limitation or inheritance, conferred upon the devisee an estate for life only. But the Courts, in many cases where the estate devised was not expressly defined, adopted certain rules of construction, to enlarge the estate to a fee simple, where such appeared, or might reasonably be inferred, to have been the intention of the testator. But this technical principle of the common law has been changed in this as well as in nearly every other State in the Union, by legislative enactments.

By the 11th section of our statute of 1796 to reduce into one the several acts for regulating conveyances, (1 *Statute Law*, 443,) it was enacted that "every estate in land, which shall hereafter be granted, conveyed, or devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple, if a less estate be not limited by express words, or do not appear to have been granted, conveyed, or devised by construction or operation of law."

The effect of this enactment is to change the rule of construction, and make an indefinite devise, without any words of perpetuity annexed, pass an estate in fee simple to the devisee. But it does not wholly preclude the question from arising upon wills which contain an indefinite devise without words of limitation, whether an estate in fee simple passes to the devisee, or only an estate for life? It is still a question of intention, but the rule of construction is reversed. Formerly an estate for life only would pass by an indefinite devise, unless a contrary intention could be inferred from the will. Now an estate in fee will pass by such a devise, unless an intention to pass a less estate ap-

Though by the 11th sec., of the act of 1796, (*Stat. law*, 443,) every grant, conveyance, or devise of lands from one person to another, "although the words necessary heretofore to convey an estate of inheritance be not added is to be deemed an estate in fee simple," if a less estate be not limited by express words or do not appear to have been granted, conveyed, or devised by construction of law, yet it does not preclude the questions which may arise upon wills which contain indefinite devises without words of limitation whether an estate in fee simple passes, or only an estate for life—the intention is to be reached by construing the whole will together.

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CARROLL'S E'S

pear by construction or operation of law. The operation of an indefinite devise is enlarged, where it stands alone, and unaffected by anything contained in the context. But the effect of such a devise still depends upon the intention of the testator, to be gathered from his whole will, according to the settled rules of legal construction.

If a devise were made to A, remainder after the death of A to B in fee, A would take but an estate for life. For although the devise to him would be indefinite, and vest in him the fee to the property, did it not appear that a less estate had been devised, yet as the devise to B in fee, after the death of A would not take effect, if the devise to the latter vested in him an absolute title to property, his interest would, by legal construction, be limited to an estate for life, so that the intention of the testator, with regard to the devise to B, might not be defeated.

A devise to the wife being indefinite and not expressly for life, will vest the fee simple unless there be something else in the will to show that a life estate only was intended and by which effect can be given to other parts of the will.

So in the present case; the devise to the wife being indefinite, and not expressly for life, it would have vested in her the fee simple title to the estate devised, if a contrary intention did not certainly and manifestly appear. As the testator designated such of his children as were to be his legatees, and fixed the amount with which they were to be charged in the division of the estate, on account of previous advancements, and directed the sale money to be paid to them, if his wife and his executor chose to sell any part of the property, unless she desired to use a part of it, which she was permitted to do, no doubt can exist that he intended them to have the property devised, after the death of his wife. The law, therefore, although there is no express devise over, vests in them, by implication, an estate in fee in remainder, in the property devised after the death of the wife. To give effect to this implied devise over the devise to the wife is limited by operation of law to an estate for life. Thus the intention of the testator, instead of being defeated, is effectuated, the accomplishment of which purpose is the prime object of all the

rules of construction which have been adopted on the subject.

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The Court below decided that the wife took a life estate only under the will, and dismissed the cross bill filed by her heirs, asserting title to the property devised. That decision is in conformity with the views expressed in this opinion. It is stated in the decree of the Court below, that after the death of the wife the estate descended to the heirs at law of the testator. They take as devisees under the will, and not by descent from the testator. But the heirs of the wife are the plaintiffs in error, and so far as they are concerned, there is no error in the decree, nor has any final decree been rendered dividing the estate among the children of John Carroll, deceased.

Wherefore the decree is affirmed.

Turner for plaintiffs; *Noland* for defendants.

Robb vs Belt and Milam.

ERROR TO THE FRANKLIN CIRCUIT.

Wills. Devises.

JUDGE MARSHALL delivered the opinion of the Court.

By the will of Shadrack Penn, sen., admitted to record in 1831, after making a separate bequest to each of his eight children, and except in one instance, for the life of the legatee, and to be divided equally among the legatees, children at his or her death, stating in each case, with the single exception that the legatee had received the amount he devises his estate by the following clause, viz:

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Case 113.

October 1.

Case stated.

12m	643
91	6
12bm	643
110	902
110	904
12bm	643
138	307

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"Ninthly, I give and bequeath to my beloved wife, Margaret Penn, all my estate, real and personal, that I die possessed of during her widowhood. Should she marry, then I desire that all my estate be equally divided among my eight children, or the heirs legally begotten of their bodies; and should my dear wife die without marrying, the property is equally to be divided among my eight children or their heirs above expressed."

The following is one of seven of the previous clauses which are substantially the same, except in name and amount, viz:

"I give and bequeath to my daughter, Margaret Kelley, one negro George, and other property amounting to three hundred and ninety-six dollars fifty cents, during her natural life, then to be equally divided among her children; which negro and other property she has received of my estate heretofore."

The sixth clause is as follows, viz:

"I give and bequeath unto my son, Nimrod Penn, six hundred and two dollars, he being absent, and it is uncertain whether he is dead or alive. It is my request, should he ever return, or should he have a legal heir, then he or his heir, shall receive the above amount, except eighty-seven dollars, which he has heretofore received. Should it be clearly ascertained that he is dead, I desire that his part of my estate be equally divided among my other children, but if he has a legal heir or heirs, then they are to have his part of my estate."

Margaret Kelley, the testator's daughter, had a daughter, Margaret Ann Kelley, who, in 1842, married W. Robb, and had a daughter, Mary M., the present complainant. A son of Margaret Kelley is also spoken of, but if she had one he died in 1839, an infant and unmarried. In 1844 Mrs. Robb, the mother of the complainant, died before the death of her own mother, who, having married Belt in 1838, died in December, 1844. A short time before her death, she and her second husband, Belt, united in a deed transferring

and conveying to J. Milam, all her interest in her father's estate and will, as well in the devise to his son Nimrod as in the last devise to his children, &c. After this, in 1849, the testator's widow, Margaret Penn, died, and afterwards in the same year, Mary M. Robb, the only living descendant and sole heir of the testator's daughter Margaret, filed this bill by her father as her next friend, claiming one-seventh of the entire estate of Shadrack Penn, including one-seventh of the share to which Nimrod Penn would have been entitled, who, on the ground of having still never been heard of, is alleged to be dead.

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All persons interested in the estate of the testator, and all entitled to contest the complainant's bill seem to have been made parties to her bill. But the case having been prepared as between her and Milam and Belt alone, was in that condition submitted to the Court for a decision of the question whether she was entitled to any interest under the will. And the Court being of opinion that upon the facts stated she was entitled to nothing, dismissed her bill absolutely.

If the complainant, as the sole descendant and heir of one of the testator's children, is entitled to any interest under the will, she is to that extent entitled to relief under this bill, and the decree cannot be sustained. It is therefore not absolutely necessary to determine whether she is entitled to the whole extent of her claim or not, and we shall consider the case without reference to the supposed death of Nimrod Penn, and as if he or his heir were claiming a share of the estate. In this aspect of the case, the sole question arises on the clause directing that on the death or marriage of the testator's wife, his estate given to her until that event, "shall be equally divided between his eight children, or the heirs lawfully begotten of their bodies." It is contended that under this clause, the eight children had immediately upon the testator's death a vested interest in remainder, to take effect upon the happening of the event referred to, that Margaret Kelly thereupon took a

A devise was made to the wife of the testator of all his "real & personal estate during widowhood," but should she marry then I desire that all my estate be equally divided among my eight children or the heirs legally begotten of their

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bodies, and should my dear wife die without marrying, the property is to be equally divided between my 8 children or their heirs above expressed."—Held that under this clause the child, one of the 8 or grand child, the child being dead took under the 8th whichever might be living at the death or marriage of the widow that no absolute and indefeasible interest vested in any of the children until the death or marriage of the widow.

vested remainder in one eighth, and that vested remainder being transmissible was transferred by the deed of herself and her second husband. But if it was the intention of the testator to give to each of his children an absolute interest in remainder, unaffected by any death which might occur before the time of enjoyment fixed by the devise, it would have been sufficient to have directed that in either of the events mentioned, his estate should be equally divided between his eight children, and the additional words, "or the heirs lawfully begotten of their bodies" would have been useless. It cannot be assumed that the testator supposed it was necessary to add these words in order to indicate the nature of the estate which the persons who should take shares in the division should have, or that he used them for that purpose. There are no such words appended for that purpose to the bequests to his grand-children. As they stand in the sentence and according to the natural meaning of the words, they import an alternative devise, and a designation of persons who are to take in *lieu* or in substitution of those previously designated or of some of them. And we think it reasonably clear that the testator looking to the event on which the division was to take place as one which might not happen for an indefinite period within which some of his children or perhaps all might die, intended to provide for such a contingency by directing that upon the death or marriage of his wife, his estate should be equally divided between such of his eight children as might then be living and the bodily heirs of such as might be dead; that is such of their descendents as would be their heirs. This construction is corroborated by the alternative devise to testator's son, Nimrod, or his heir.

If the word *or*, should, as contended for, be read *and*, that is, if the word *and* had been actually used, and the direction had been to divide the estate between the testator's eight children and the heirs of their bodies, it might still have been questionable whether the words "heirs of their bodies," should not be understood as

designating the persons who were to take in the place of deceased children, for of such only, could there be heirs of the body, and not as words of limitation describing the interest to be taken. For this latter purpose they would be inappropriate, in the connection in which they would stand, or at least would be an awkward mode of expression. And it would seem that if the testator had intended to use the words "heirs of their bodies" as descriptive of the estate of the devisees, or as designating the course of descent from them, that is, if he had intended them as words of limitation, he would probably have said, "to them and the heirs of their bodies begotten," which is the usual mode of expressing such intention.

‡ But the will reads sensibly in its present form, makes a provision just and natural for the contingency evidently contemplated of some of the eight children dying before the division was to take place, and may have a certain definite and legal operation according to its letter. There is, therefore, no ground for changing the word *or* into *and*; and the cases in which this has been done to avoid an absurdity, or to prevent the destruction of the devise on account of uncertainty, or to effectuate the obvious intention of the testator, furnish no authority or precedent for making such a change in the present case, if the consequence would be to change the effect of the devise.

The words "their heirs lawfully begotten of their bodies," as applied to the testator's children must mean the heirs of their respective bodies, or the respective heirs of their bodies. And as there cannot be an heir of a living person, they mean further the bodily heirs of deceased children, or of such children as may be dead at the time referred to. And if the devise is to them as heirs of the deceased child, it is a devise of his or her portion which they would take as heirs, and being to the heirs of the body, it is a devise to such descendants of the deceased child as would be his or her heirs. The words "or

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The word *or* will not be construed to mean and unless such a construction, be necessary to prevent absurdity or to prevent a destruction of the devise for uncertainty.

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their bodily heirs," then taken as a designation of persons or as words of purchase, are equivalent to the words "or such decedents of any that may be dead or may then be their heirs," referring to the time of the division. If all this were expressed, it would be evident that the division was intended to be between the children living at the time referred to, and the heirs of the body of such as were then dead. And to express the intention fully, the word *and*, instead of *or*, would be proper. But as the testator does not say among my living children, but among my eight children, *or* is proper to show, and does show, that as to some of them there is an alternative devise in case of their death before the time referred to, and that in that event the heirs of the bodies of the deceased are to take, in the place of the deceased.

We are of opinion, therefore, that the proper construction of the clause being that the division is to be made between the testator's children who may be living at the time of the event referred to, and the heirs of the bodies of such as may then be dead, which is the only devise to any of them, the testator did intend to control the property until the happening of the event when the division was to be made, and that whatever interest any one, or all of his children may have had upon his death, was subject to that control, and therefore subject to be defeated or terminated by the death of such child before the time of division, and belonged, by the will, to the heir or heirs of the body of such decedent living at the time fixed for the division.

Where there is a bequest to A or his personal representatives, the word *or* generally implies a substitution, so as to prevent a lapse: *Wms on Ex'ors.* (3d Am. ed. from 4 Lond. Ed. page 1041.) where *Gittings vs McDermott*, (2 Myne and K., 69,) is referred.

In a late edition of *Williams on Executors*, (3d Am., 4th London ed., page 1041,) the author says: "Further, it seems to be now established that where there is a bequest to A, or his personal representatives," or "to A or his heirs," the word *or*, generally speaking, implies a substitution, so as to prevent a lapse; and he refers to the case of *Gittings vs McDermott*, (2, M. & K., 69,) where the bequest was as follows:

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"I give and bequeath to the children of my sister, E. Wall, or to their heirs, the following sums, &c., that is to say, to L. W. £100, to S. W. £200, to S. T. £200, W. W. £200, C. B. £200, E. W. £100." Several of the children of the sister E. W. having died before the testator, it was held that the word *or* implied a substitution in contemplation of the pre-decease of the children, and that the word *heirs*, (which, in respect to personal property, must be taken to mean next of kin,) provided, with sufficient distinctness a substitute for the children pre-deceased. And as this construction precluded a lapse in the case of the Walls, it was held that the words employed touching the residue must be taken in a like sense, although the residuary clause gave the remainder to his two sisters in equal shares; each one-half, "*and upon their deaths respectively to their heirs*," which, standing alone, would, as the Court said, carry the whole interest to the sisters themselves. There cannot be any difference in the meaning of the word *or* in a devise of real estate, and a bequest of personalty. And although the words "heirs of the body" are technically words of limitation, yet they are also frequently used as words of purchase, and have that operation when it sufficiently appears that they are used not to embrace the whole line of heirs of the body in succession, but only to designate by that description, particular persons who may be heirs of the body at a certain period or event. The word *or*, then, indicates substitution. The time when the substitution is to take place is fixed; and it is sufficiently certain that the children who may be dead at that time are to be substituted by the persons who may then be heirs of their bodies respectively. The time or event at which the substitution is to take place being fixed, the question whether the words "heirs of their bodies" are to be taken as words of limitation or words of purchase, is substantially the same as it would be if one of the testator's children had died, leaving descendants between the date of the will and the testator's death. If

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they are words of limitation, there would, in the case supposed, have been a lapse; if they are words of purchase, the heirs of the body of the pre-deceased child would have taken as devisees under the will. And so we think the complainant is entitled to take under this will.

Then, as the testator had a right to control his estate up to and at the period fixed for the division, and has done so, it follows that whatever interest any of his children may upon his death have had in his estate devised by this clause of the will, was subject to be defeated by the death of the child before the death or marriage of testator's wife, when the existing heirs of the body of the deceased child would become absolutely entitled under the will. To the extent, therefore, of at least one-eighth of the estate devised by this residuary clause, the deed of Belt and wife was ineffectual as the event has turned out. And the complainant, as the sole descendent of one of the testators, eight children is entitled to one-eighth part, and consequently has a right to maintain this suit for partition and distribution. The dismissal of the bill was therefore erroneous. And as the question as to the interest intended for Nimrod Penn, or his heir, may depend upon facts not yet fully developed, we have not deemed it necessary now to decide, or even to investigate it.

Wherefore the decree is reversed and the cause remanded for further proceedings consistent with this opinion.

Bell and Barbour for plaintiff's; *Harlan and Herndon* for defendants.

Moore vs Moore and others.

CHANCERY.

[25m651]
120 258

ERROR TO THE BOURBON CIRCUIT.

*Devises. Entails. Guardian and Ward.***Case 114.****January 27.****Case stated.**

JUDGE GREENSHAW delivered the opinion of the Court.

JOHN MOORE, deceased, a son of Peter Moore, Sr., deceased, by his last will and testament, devised to his daughter Martha, forty and a half acres of land on which he lived, but, in the event of his said daughter's dying without issue, the said land together with some bequests of personal property and slaves, to be equally divided between his brothers and sisters, George, Peter, and Patsy Moore, and Jane McClanahan. Martha Moore was then an infant, and said George Moore became her statutory guardian.

Whilst said Martha was still under twenty-one years of age, her guardian, the said George Moore, at her request and for her, purchased a tract of land in Bourbon county containing about forty-four acres. He took the deed for this land in his own name, but with no intention to appropriate it to himself. After Martha arrived to the age of twenty-one years, she intermarried with Noah S. Moore, and George Moore conveyed this land to Noah S., and his wife jointly. Not long after this conveyance, Martha died without issue.

In 1825, Patsy Moore, deceased, made her last will and testament, under and by virtue of which, the said Martha and Peter Moore, became entitled to a tract of about forty two and a half acres of land in Fayette county, subject, so far as Martha's interest was concerned, to a life estate in Jane M'Clanahan. Said George and Peter Moore, were made the executors of Patsy Moore's will, and some arrangement was made between them and Jane M'Clanahan, (and as they allege

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with Martha, also,) by which this tract was sold and conveyed by said executors to Joseph Smith, for about the sum of \$800. Four hundred dollars of this sum, (which from the pleadings, we take to be the amount of interest of Jane M'Clanahan and Martha, in this land,) was laid out in negroes. These negroes appear to have been held by Jane M'Clanahan, during her life, and, at her death, to have passed into the hands of Martha, and, on her marriage, to have gone with her into the possession of her husband, Noah S. Moore, where they have continued.

After the death of said Martha, Thomas L. Moore, William S. Moore, Robert H. Moore, and Mary Barton, and her husband, John Barton, who are the half brothers and sister, of the said Peter, George and Patsy Moore, and Jane M'Clanahan, and uncles and aunt of the half blood to said Martha, brought this suit as heirs to said Martha, in the Bourbon Circuit Court, against the said Peter, George and Noah S. Moore, and the heirs of the said Joseph Smith. They charge that by virtue of the devise of John Moore, deceased, to his daughter, Martha, she was vested with an absolute fee simple estate in the said first mentioned tract of land, and that the same has descended to her heirs, the remainder over to the full brothers and sisters of John Moore deceased. in the event of the death of his daughter, Martha, *without issue*, being void. They insist also, that the conveyance by George and Peter Moore, to Joseph Smith, of the tract of about forty two and a half acres in Fayette, did not pass the title of said Martha, in the same; that the proceeds of the sale which were laid out in negroes, were the proceeds of Jane M'Clanahan's life interest in the land, and that she became entitled absolutely to said negroes; and that the conveyance of George Moore, to Martha, and her husband jointly of the tract in Bourbon, of about forty four acres, was illegal and improper, and that so far as the legal title to the same, passed to Noah S. Moore, he holds the same in trust for the heirs of the

said Martha; they pray that their interest in all three tracts may be allotted to them as part of the heirs of said Martha, and for their interest in said slaves.

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We will first enquire whether, in the devise by John Moore to his daughter Martha, of the first mentioned tract of land, the limitation to George, Peter, and Patsy Moore, and Jane McClanahan, in the event the said Martha should die without issue, be such as the law allows. The language used by the testator is, "and if my said daughter, Martha Moore, *should depart this life without issue*, it is my will and desire that the aforesaid willed property be equally divided between my brothers and sisters, to wit: George, Peter, and Patsy Moore and Jane McClanahan."

1st question arising on the will of John Moore to his daughter Martha Moore, in these words: "and if my said daughter Martha Moore should depart this life without issue, it is my will and desire that the aforesaid willed property be equally divided between my brothers and sisters."

If the testator meant by the words, "*should depart this life without issue*," a dying without issue living at the death of said Martha, the devise over is good, and upon her death, the said brothers and sisters were invested with the estate. If, on the contrary, he meant a dying without issue, at whatever remote period her issue might fail, then the contingency upon which the devise over is to take effect is too remote, the limitation is void, and Martha Moore was vested with an absolute fee simple, and at her death this land descended to her heirs.

So far as we are advised, there has been no case before this Court, requiring it to give an interpretation to the words *dying without issue*, or, to words of similar force and effect, when standing alone, and without any qualifying and restraining expressions. The decisions in all the cases of executory devises which have heretofore come under revision in this Court, in which the phrase, *dying without issue*, or, *dying without heirs*, has occurred, have turned mainly, if not entirely, upon other expressions, used by the testators in their wills, which manifested the intention to be to confine and limit the failure of issue to the death of the first devisee. In this case, we have not been able to find any such qualifying expressions; and it be-

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comes our duty to determine whether the testator, John Moore, meant by the use of the words, *dying without issue*, simply an indefinite failure of issue, or the failure of issue at the death of the first taker, Martha Moore.

Moore's Trustees vs Moore's heirs, reviewed.

Notwithstanding this Court has not *decided* what these words mean, unaided by other expressions, they have heretofore intimated, in strong terms, what their interpretation *ought to be*. In the case of Moore's trustees against Moore's heirs, that clear-headed and distinguished jurist, Chief Justice Boyle, makes the following remarks :

" If, as was urged for the appellant, the expression *without issue*, used in this devise, must be understood to mean an indefinite failure of issue, then, as that event was of a character which might not for many successive generations have happened, the devise over must be deemed void ; but if, as was contended on the other side, the expression is to be understood to mean, dying without issue living at the time of the death, then it is plain that the devise over must take effect, if at all, within the allowed period to make such a limitation good. The latter of these meanings is much the most common and obvious. The former, indeed, appears to us to be a very strained and artificial meaning of the expression. According to this meaning, although a man should die leaving issue who afterwards dies, yet he may be said to die without issue. In such a case, as he would be dead, and his issue extinct, he might, no doubt, with strict propriety, be said to be dead without issue ; but without assigning to the words the most strained and artificial meaning, he could not be said to have died without issue." Yet he says, " a majority of the modern cases agree that the expression of dying without issue, should be taken to import an indefinite failure of issue, unless the contrary appears from other circumstances in the will."

Again : in the case of *Brashear &c., vs Macey, &c., &c.* (3d, J. J. M., 89,) the Court said :

"In a devise of personal estate, the expression *dying without issue* is invariably interpreted to mean *ex vi termini*, issue living at the death. But when the devise is of real estate, there is some diversity in the ancient authorities as to the import and effect of the same expression. Some of these authorities have endeavored to establish a subtle and arbitrary doctrine on this subject, neither the reason nor justice of which can be perceived by this Court." The Court says further in that case: "It is our opinion that the weight of authority is decidedly opposed to any distinction in the construction of the expression, *dying without issue*, in a devise of personal or real estate, and therefore in both it means the same thing."

In that case the Court, in allusion to other circumstances in the will which assisted them in giving an interpretation to these words, and by the use of which the interpretation was determined, remark:

"These we should consider conclusive, even if we be mistaken in the *opinion* that the expression, *dying without issue*, of itself and alone, means issue living at the death."

This Court, then, if they have not *decided* what, when standing alone, these words mean, have, in their argument, expressed their *opinion* of their meaning, and pointed out what their *decision* would be, when necessary to make it.

Issue in common parlance, and as used generally by the community, signifies *immediate* descendants—*children*. And to tell those who have not made the law their study, that the phrase, "if Martha should die without issue," does not contemplate her death without an immediate descendant of her body, *at her death*, but, a failure of those lineally descended from her, a hundred, or two hundred years *subsequently* to her death, is to tell them not only what surprises them, but what they do not understand, and what they cannot be easily made to apprehend. Such language, with such meaning, is "Greek" to them. And yet this artificial,

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Brashear, &c.
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(3 J. J. Mar-
shall, 89,) re-
viewed. A case
of a devise of
personal estate
where the terms
"*dying without
issue*" was con-
strued to apply
to the death of
the devisee. —

The term *issue*
in common par-
lance means im-
mediate descend-
ants children.

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ungrammatical and unnatural interpretation of the phrase, is to be applied to the construction of *their* wills, in order to ascertain and give effect to *their* meaning! Is it not tantalizing the community to allow them the privilege of making their wills, if the Courts, in construing and interpreting them, are to wrest the language they employ from its plain and obvious meaning and import; and, by applying strained, artificial and arbitrary rules of interpretation, make them mean what *it is acknowledged* they do not mean? We say what *it is acknowledged* they do not mean; for, not only many of the judges of our own country have substantially made such acknowledgment, but Lord Thurlow is reported to have said, in the case of *Bigge vs Bensley*, (1, Bro. Cha. Rep., 188 :) "I agree with you, that the general sense of dying without issue, is at the time of the death. That is the grammatical construction, and is the sense in general of those who use the words. (See *Fearne on Remainders*, 483, note z.) In the appendix to *Fearne on Remainders*, note 4, page 612, is to be found the following language, said to have been used by one of the Judges of England: "This is the common sense and meaning of the vulgar, to-wit: when they speak of the death of a man without issue, this is to be intended of the death of him without issue living at the time of his death: and deeds are to be expounded according to the intention. And therefore, if one had asked a countryman whether C had died without issue, he would have answered, "No," (although that issue died afterwards) because he had issue living at the time of his death; and expositions are to be made according to common intentment."

The language of wills is to be construed according to common intentment, as well as other instruments; technical rules must not defeat intention.

That expositions are to be made according to common intentment is agreed by all. To whatever instrument we may be giving a construction, the words which have been employed by their author should be taken in the sense in which he understood them; and, in cases in which technical rules have been applied to

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particular expressions by the Courts, if we are satisfied after an examination of the instrument, those technical rules will not carry out, but defeat the intention of the author, the technical rules must yield to the intention, and such a construction must be given as will effectuate it.

Chancellor Kent says that, "the idea that testators mean by a limitation over upon the event of the first taker dying without issue, the failure of issue living at his death, is a very prevalent one, but it is probable that in most instances, testators have no precise meaning upon the subject other than that the estate is to go over, if the first taker has no posterity to enjoy it. If the question was put to a testator," continues he, "whether he meant by his will, that if his son, the first taker, should die leaving issue, and that issue should become extinct in a month or a year afterwards, the remainder over should not take effect, he would probably, in most cases, answer in the negative." Now, with due deference, we think that testators *do* have a precise meaning upon the subject, and that meaning is, that if the first taker die without issue at his death, the estate is to go over. We take it that, when the testators use such words, they have in their minds no other posterity than that which may be alive at the death of the first objects of their bounty. Their minds, at the time, do not look beyond the death of the first taker. If a testator is reminded, at the time of making his will, that the event supposed by the learned author might probably occur, he might, and we think would, provide for it. A testator, in our opinion, who had used such words, and who would answer the question put in candor, would say, "I meant, if the first taker should die without issue, living at the time of his death, the estate should go over. The event which *you* mention did not occur to my mind when I was making my will—had I thought of it, I would have provided for it." The testators meaning, in the supposed case, "hath this extent—no more."

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There is no reason why a devise applicable to personal estate, and one applicable to real in the same words should be differently construed.

In view of the interpretation which it is manifest this Court has heretofore been disposed to put upon the words under consideration, we have made no reference to English adjudications, and but a slight reference to any remarks of the English jurists. If those adjudications do not invariably interpret the words, *dying without issue*, where there are no other expressions in the will to confine the limitation to the death of the first devisee, to mean an indefinite failure of issue, there are but few exceptions.

We are free to confess that the weight of English authority is opposed to the interpretation which we are disposed to give them. But whatever may have been the causes which originated and continued the unnatural signification which the English Judiciary attached to these words; whether owing to the genius of their government, or to the spirit of their laws growing out of their system of entailments, it is certain that their Courts of Chancery, as if conscious of original and continued error, "seize with avidity any words in a will to tie up the generality of the expression, *dying without issue*, and confine it to dying without issue living at the time of the decease;" at least, in regard to terms for years, and personal estate; and we are utterly unable to see any good reason, in this country, for a different construction of the same words when applied to real estate. It is obvious that the judges of England would gladly be relieved from the shackles of judicial construction in which they have bound themselves, but their interpretation of those and similar words, having been the law of England for more than a century, it would not now be easy to retrace their steps; and to do so after such a lapse of time, might result in more harm than good. The law is understood, and their people have shaped their course accordingly. *Here* the law is not so understood by our people; it is unnatural, contrary to the common sense and common understanding of the community, and there can certainly be no propriety in our adopting

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a construction which we believe to be at war with the intention of testators, and frustration of their benevolent purposes. The great object is to give effect to their intentions, and such we acknowledge to have been the aim of English jurists; but in England there has ever been, on the part of the opulent, a desire to take estates out of the channels of commerce, and confine them to their descendants for successive generations. *There* entails have for centuries been allowable, and their Courts have been fruitful in ingenious devices to dock them. The disposition among large landholders to keep their estates in their families from age to age, was opposed by a contrary disposition on the part of their judges. It was natural when it became their duty to interpret a will, to incline against any attempt to create a perpetuity; and the disposition on the part of their citizens being to create them, it was easy for their judges to infer that such was the intention whenever expressions were used which would authorize the inference. *Here*, our citizens know that the law has denounced entails, and no disposition exists, as we believe, to create them—to trammel estates and restrain them to a long and successive line of descendants.

Here, our laws are made by ourselves, through our representatives; and we have chosen, in accordance with the genius and spirit of our government, to declare by statute that estates shall not be entailed. The community know this to be the law. We know that we can limit an estate for a life or lives in being, and twenty-one years and ten months thereafter. With this privilege we are content. Not a case has occurred in the numerous causes brought to this Court of a disposition to create a perpetuity, unless the one under consideration be that case: our citizens have no disposition to do so. We ought not, therefore, to presume the intention of a testator to be that which is contrary to the common sentiment of the community, contrary to law; and, aside from the judicial construction of the English Courts, and of some of the Courts of the United

The law of Kentucky, not authorizing an entail, the Courts should not presume that the citizen intended to create an estate which the law did not sanction.

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A devise of land to one "*and she should depart this life without issue.*"—Held to mean issue living at her death and not an indefinite failure of issue, and a valid limitation.

States, not authority here, contrary to the natural import and common-sense meaning of the language employed.

Whatever, therefore, my have been the intention of testators in England by the use of the phrase "dying without issue," we are satisfied that, in this country, they mean by this phrase a dying without issue living at the death of the first devisee. And consequently the limitation to George, Peter, and Patsy Moore, and Jane McClanahan is valid.

We will next consider whether the complainants are entitled to any relief upon their prayer to have allotted to them one-eighth of the tract conveyed by George and Peter Moore, to Joseph Smith.

Questions arising on the will of Patsy Moore.

This land was a part of the estate of said Patsy Moore, deceased. Before her death she made a will, and after some specific devises and bequests, she gives the remainder of her estate, both real and personal, to her brothers and sisters, to wit: the said George and Peter Moore, and Jane McClanahan the portion which should fall to the share of said Jane, to be held by the said Peter and George in trust for the said Jane during her life, and after her death, and her said share to go to the said Martha.

No division is alleged to have been made between the devisees under this will, but we can draw no other inference from the pleadings, than that a division was made, and that the tract of 42½ acres lying in Fayette county, was allotted to Peter Moore and Jane McClanahan. By the will of Patsy Moore, George and Peter Moore were made executors thereof; and, although no authority is conferred upon them to sell and convey, conceiving, as we suppose, that by virtue of their office of executors, they had such authority, they sold and conveyed this land to Joseph Smith, styling themselves, in the deed of conveyance, executors of Patsy Moore, deceased. Peter and George allege, however, in their pleading that it being thought to be the interest of the said Jane McClanahan and Martha Moore, to sell

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this land, the sale was made with their consent. The consideration for which it was sold, was \$800. Peter Moore being entitled to one-half of this tract, retained the sum of \$400, and the other \$400, (being the said Jane's and Martha's share of the proceeds of the sale,) was vested in negroes. The bill of sale for these negroes is executed to the said George and Peter Moore, for the use of the said Jane McClanahan during her life, and after her death, to said Martha Moore and the heirs of her body, "otherwise to belong to said George and Peter Moore."

These negroes were taken into the possession of Jane McClanahan, and were used and enjoyed by her during her lifetime; and after her death, and during the minority of the said Martha, they were hired out by the said George as guardian for the said Martha, and at her majority, they were taken into her possession and enjoyed by her; and, upon her intermarriage with Noah S. Moore, they went with her to her husband, were jointly enjoyed by them during her life, and since her death they have continued and remained in the possession of the said Noah S. Moore, who claims to be their absolute owner.

This tract of 42½ acres of land, belonged to the said Peter Moore and Jane McClanahan; he having a fee simple interest in one-half of it, and she a life interest in the other half, remainder to Martha Moore in fee. Peter and George, as executors of Patsy Moore, had no right to sell this land to Joseph Smith, or to any one else. Peter had a right to sell his own interest, but George had no interest in it unless he might be said to have had an interest as guardian for the said Martha. They could not sell and convey the interest of the said Jane and Martha, so as to bind them, by mere parol consent and authority. But Jane had but a life interest, and being dead, she is not concerned in this suit. And George Moore having been the guardian of the said Martha at the time of the sale to Joseph Smith, the question is, whether she had not a right, upon arriving

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A statutory guardian has no right to convert the real estate of his ward into personalty or personalty into realty—except subject to the ratification of the ward: (Reeve Dom. Rel., 334 in note,) Kent's Com. 2 Vol. 260 See 1 Rawle 266 Contra.)

at full age, either to approve or disapprove the sale—to reject or affirm it.

There is some contrariety of opinion as to the power of a guardian to convert his ward's real estate into personalty, or his personalty into real estate; but the weight of authority is decidedly against the exercise of such power. We take it to be the established doctrine, however, that he may exercise it, *sub modo*, subject to the ratification or rejection of the ward, when he shall arrive at full age. It is said in a note in *Reeve's Domestic Relations*, 334, that "guardians are generally subject to the same rules as other trustees. And the doctrine that a trustee cannot convert a trust fund of money into land, or real estate into personal, is well settled. Generally if the trustee does invest such fund in real estate, the *cestui que trust* may, at his option, accept the lands, or refuse them, and demand his money. That a guardian is so far subject to this rule, that he cannot thus change the property of his ward without the authority of a Court of Chancery, is also well settled."

Kent remarks in his *Commentaries*, (2, Vol. 230,) "It is said that such a power may be exercised by a trustee or guardian, in a clear and strong case, without the previous order of a Court of Equity; but the infant when he arrives at full age, will be entitled, at his election, to take the land or the money with interest. And if the guardian puts the ward's money in trade, the ward will be equally entitled to elect to take the profits of the trade, or the principal with compound interest, to meet those profits when the guardian will not disclose them." And it is added, in a note upon the same page, that it was intimated in *2nd Eden*, "such power might be exercised without a previous authority; and it was allowed and sustained afterwards by the Supreme Court of Pennsylvania, in *1st Rawle*, 266. But it is an extremely perilous act in a trustee, and cannot be recommended."

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From these authorities we conclude that the doctrine is, that the exercise of such power is always at the hazard of the guardian, being subject to the approval or disapproval of the ward, when he shall arrive at age. And that the ward, when of age, *has the right* either to affirm or disaffirm.

In this case, Martha Moore having received the negroes into her possession after she was twenty-one years of age, and they having been used and enjoyed by her, and by her and her husband during her life, and never having expressed any dissent to the change which her property had undergone, amount, in our opinion, to an affirmance of the change, and to an election to take the negroes instead of the land. It was not erroneous, therefore, in the Circuit Court to decree the title of the heirs of Joseph to be quieted.

We have seen that, in the purchase of the negroes which were bought with the proceeds of the interest of Jane McClanahan and Martha Moore in this land, George and Peter Moore attempted to secure the negroes to themselves, in the event the said Martha should die without heirs of her body. This they could not do. The proceeds belonged to Jane McClanahan for life, remainder to the said Martha absolutely—the proceeds were *theirs*, and the law would hold George and Peter Moore to have acted as trustees, and to have acquired the negroes wholly for the said Jane and Martha. The said Martha, being entitled, therefore, after the death of said Jane, to said negroes absolutely, the same interest, upon her intermarriage with Noah S. Moore, was vested in him.

It remains that we consider whether the complainants were entitled to a decree for a portion of the land conveyed by George Moore to Noah S. Moore, and his wife, the said Martha, jointly, after their intermarriage.

This is the tract of land which was purchased by George Moore, whilst he was the guardian of the said Martha, at her instance, and for her. It was paid for

A guardian having sold the land of his ward and purchased slaves with the proceeds, and the ward on arriving of full age having married and received the negroes into possession— Held that such acts amounted to a ratification of the acts of the guardian in changing the character of the property from real to personal.

A cestui que trust where the fund is converted into other property will hold the same right in the trust property—it is subject to the same rights as if no change had taken place.

The statute abolishing the *jus accrescendi* does not apply to conveyances made by husband and wife.

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chiefly by the means of Martha, but, partly, with the means of George Moore. He says that he conveyed the land to Noah S. Moore and the said Martha jointly, because he believed the conveyance to her could be made in no other way. Noah S. Moore charges that the reason assigned by George Moore for making the conveyance to himself and wife, jointly, is not the true one, but that he made it in that way at "the earnestly expressed wishes and desires of the said Martha," and because he had undertaken to pay that portion of the purchase money which had been advanced by the said George Moore out of his own means.

Land was purchased by the guardian with the funds of his ward and conveyed to the ward and her husband.—Held that upon the death of the wife the husband did not succeed to the ownership of the land.

There is no proof in regard to Martha's wishes and desires to have this land jointly conveyed to herself and husband; and, if there were, it would not avail anything. True, we might, and do feel, a desire that her wishes, if she expressed any, in reference to her husband, could be complied with, but, unless the law will give him this land, any feeling which we might have, cannot be gratified.

Noah S. Moore, being a joint grantee with his wife, and being, as he says, seized of the entirety during their joint lives, claims the whole of this land by survivorship. Had they been *jointly entitled*, he would, as survivor, have a right to the land—the statute of this State abolishing the *jus accrescendi* between joint tenants, not applying to estates granted jointly to husband and wife. But we are of opinion they were not jointly *entitled* to the land. Before George Moore made the conveyance to Noah S. and wife, she was the equitable owner of the land; as much the equitable owner, as she would have been the legal owner, had the conveyance, before that time, been made to her alone. It is clear that, in that state of case, she could have made no contract or co-tenancy with her husband, or with George Moore, by which to divest herself of her title; and, it is equally clear to our minds, that no wish, or desire, which she might have expressed to George Moore, or her husband, or to both, and thereby procur-

ing a joint conveyance to herself and husband, would enable her to invest her husband with a joint interest in the land.

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The general principle of the law is, that a wife cannot so contract as to bind herself; her contracts, are void. She is presumed, in most cases, and the case under consideration comes not within any exception to the rule, to act under the power of the husband, and by his coercion. And if she cannot make a *contract* which would bind her, it is evident she cannot be bound by an act done merely by request—a *fortiori* she cannot be bound where it was done, as in this case, as far as the proof shows, without even a request. If *she* was not bound neither are her heirs.

It is laid down in *Story's Equity*, page 617, that "a married woman is disabled from making any contract respecting her real property, either to bind herself, or to bind her heirs: and that this disability can be overcome only by adopting the precise means allowed by law to dispose of her real estate; as in England by a fine, and in America by a solemn conveyance." So far, therefore, as Noah S. Moore was the recipient of the mere legal title to this land, he held the same in trust for his wife, and now holds the same in trust for her heirs.

A *feme covert* can make no contract in respect to her real property in Kentucky, either to bind herself or her heirs, unless by adopting the precise means pointed out by the enabling statutes—by solemn deed.

The Circuit Court decreed the tract of land conveyed by George Moore to Noah S. Moore and wife, to the heirs of Martha Moore; and decreed said heirs to pay said George the sum of \$503.09, besides interest, being the amount which said George had advanced out of his own money in the purchase of said land; and directed Noah S. Moore to surrender possession thereof to said heirs, and to convey to them all his right and title thereto, and in default thereof appointed a commissioner to convey; and decreed against him the sum of \$390 for the rents of said land.

That Court was of opinion, and so decreed, that the tract devised by John Moore, deceased, to Martha Moore, and in default of her issue, to his full brothers

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and sisters, belonged to said brothers and sisters : that the heirs of Joseph Smith were entitled to the land which had been conveyed to their father, Joseph, and ordered their title to be quieted ; and that Noah S. Moore was entitled to the slaves which had been purchased with the proceeds of the sale of this land to Smith.

In addition to the errors assigned by the appellant and already disposed of, he complains that the Court erred to his prejudice in decreeing against him said sum of \$390 for rents, and in dismissing his cross bill against William S. Moore, &c.

We perceive no error in this part of the decree. If, as we have decided, he is not entitled to the land, it results necessarily, that he is responsible for rents to the true owners ; and in regard to his cross bill, it is equally clear to our minds that the Court committed no error in dismissing it, as it was done without prejudice. As administrator of his wife, he seeks a fund which he alleges to be in the hands of the defendants derived from the estate of Peter Moore, Sr., deceased. That estate has no connection with this controversy, and it is inappropriate and improper to adjust it in this suit, sufficiently burthened already with questions of its own.

Peter Moore assigns for error, that the Circuit Court improperly decreed the heirs of Martha Moore to pay him the sum which he advanced toward the land conveyed to her and her husband, instead of decreeing that amount to be paid by Noah S. Moore. We do not perceive why *he* should complain of this part of the decree ; if he gets his money, it ought to be immaterial to him from what source it comes, unless he may look upon himself as included in this decree, as one of the payors, and bound by its terms to pay a portion of it to himself. The decree does, *in terms*, include himself as one of the payors, he being one of the heirs of Martha Moore, but we understand the decree to mean, that the *other* heirs are to pay *him* said sum. This sum is a charge upon the land for which he would have a lien upon it,

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but he does not complain because the decree is personal, and not *in rem*, but because the *heirs* are directed to pay it, instead of Noah S. Moore. It is true that Noah S. Moore promised to pay him this money, but this promise was made, as we understand it, in consideration of the land, and that consideration has wholly failed, and he is exonerated thereby from any responsibility.

The complainants, in their bill, prayed to have their portion of the land *allotted* to them, which was not done by the decree, but no complaint is made on this score.

The decree of the Circuit Court, being in accordance with the foregoing views, is affirmed.

Noah S. Moore was directed to convey to the heirs of Martha Moore, the land which he was decreed to surrender to them; and a conveyance not having been made, the Court, upon the return of the cause, should have this conveyance made by him, or by a commissioner, to said heirs.

Davis for plaintiff; *Robinson & Johnson, Smith and Victor* for defendants.

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ACCEPTANCES.

See *Bills of Exchange*.

ACTION ON THE CASE.

See *Malicious Suits*.

ADMINISTRATION.

1. One creditor of a decedant who suggests a debt due to the estate and claims the exclusive benefit thereof to be decreed to him, cannot, in a case of settlement of the estate, under the act of 1839, have any greater benefit therefrom than his *pro rata* share. *Martin vs Martin*, 310.
2. Under a proceeding under the statute of 1839, for settling an estate, one creditor suggested a debt due to the estate, in his answer setting up his demand, and claimed that the whole be applied to the payment of his demand—held that he had a right to his *pro rata* distributive share only. *Jenkins vs Edens*, 241.
3. A wife, by anti-nuptial contract, reserved her property, real and personal, with the issues and profits thereof to her separate use, to be at her own disposal by sale or will; she died without making any disposition thereof—held that the husband had the right of administration. (*Wms. on Exors.*, 244. *Tollars Law of Exors.*, 84-'5. 11, *B. Monroe*, 138. *Stat. Law*, 661.) *Hart & Evans vs Soward*, 392.

See *Sheriff*

ADVERSE POSSESSION.

1. Where a son enters upon land of his father by his consent, looking to the father for the title, the possession is not adverse. *Wells vs Head*, 170.
2. If an only son enters upon land having his father's bond for title, and the title descend upon the son, the equitable title merges in the legal, (*Barton on real prop.*, 426. 3, *Vey., jr.*, 329 : *lb.* 120. 6, *Mad.*, 118.) So of an estate at will under like circumstances. *Ibid*, 171.

ALIMONY.

1. A bill for alimony should state the complainant to be the lawful wife of the defendant; not merely that she lived with him as his lawful wife. *McDonald vs Fleming*, etc., 287.
2. A woman who lived with a man as a concubine advanced to him money, which he paid for the lots which they occupied: held that she was entitled to a lien upon the lots to the extent of the sum paid of the price. *Ibid*.

APPEALS AND WRITS OF ERROR,

1. Cannot be prosecuted to the Court of Appeals from judgments of the County Court affirming or reversing judgments of Justices of the Peace (1, *Statute law*, 133,) yet they may be prosecuted from judgments dismissing appeals from such judgments (10 *B. Monroe*, 196, 292.) *Miller vs. Yicum*, 422.
2. An order of the County Court confirming the report of commissioners of the settlement of the accounts of executors and administrators is not such a final decree or judgment as authorizes a writ of error to be prosecuted therefrom to the Court of appeals. (Judge Ilise dissenting.) *Scott's heirs vs Kennedy's executor*, 515.

APPEALS FROM JUSTICES.

1. A plaintiff suing before a justice, and claiming more than 25 shillings and less than £5, and obtaining judgment for less than 25 shillings, has the right of appeal to the County Court: (2 *Stat. law*, 887, 889.) *Mills vs Conchman*, (4 *J. J. Marshall*, 242.) *Vance vs Cox*, (2 *Dana*, 152.) *Miller vs Yocum* 422-3.

APPEAL BONDS.

1. In cases of appeal or writ of error from decrees foreclosing mortgages upon lands, the appeal bond does not and is not intended to secure the debt for which the land is subject: (5 *Litt.*, 365.) So in case where personal property has been attached and sold, and the funds in the hands of the Court: *Worth, &c., vs Smith*, (5 *B. Monroe*, 504. Though it might be different where the property was not sold but in the hands of defendant—*argu*.
2. But where there is a personal decree, and it is suspended by writ of error to the Supreme Court, the surety in the bond is liable for the whole amount of the decree upon its affirmance, though a steam boat may have been attached which might also be liable for the amount of the decree. The proceeding being first in *rem* and in *personam* but lastly in *personam*, as the boat was not delivered by defendants: *Graham vs Swigert*, 529.

ATTACHMENTS.

1. Where attachments issue to recover the amount of notes, the Court may render judgment without the intervention of a jury, but where the demand arises upon agreement and the amount of the recovery is not certainly ascertained a jury must ascertain the damages. *Weathers vs Mudd*, 112.
2. Where property attached has been replevied, an order of sale is not proper: *Weathers vs Mudd*, 113.

ATTACHMENTS—CONTINUED.

3. The statute directing personal property other than slaves to be first levied upon by attachment is directory only, to the officer, and does not render invalid a levy upon slaves, though there be personal estate. *Wathers vs Mudd*, 114.

ATTACHMENTS IN CHANCERY.

1. The statute of 1828 (2 *Stat. law*, 1411,) authorizes a surety where his principal is about to remove his property out of the Commonwealth to attach it—not where the removal is out of the county only. *Rice vs Downing, &c.*, 45.
2. A surety is not a creditor within the meaning of the act of 1838, (3 *Stat. law*, 116,) and therefore has no right to sue out an attachment in chancery on the ground that his principal is about to make a fraudulent disposition of his property: *Ib.*, 45.
3. The act of 1748 gives no remedy to a surety for rent either at law or in chancery to attach the property of the tenant for the rent, on the ground that the tenant is about to remove his property out of the county, though the landlord may have such remedy. *Ib.*

See *Equity Jurisdiction*.

ASSIGNMENTS.

1. A supercedas bond is not assignable so as to authorize a suit in the name of the assignee, (nor is a replevy bond: 5 *J. J. Marshall*, 69.) *Yantes vs Smith*, 395.

ASSUMPSIT.

1. A misjoinder of plaintiffs in assumpsit is fatal to the action. *Brent's executors vs Tivelaugh*, 88.
2. The modern doctrine allows defendants in actions of assumpsit to limit or reduce a recovery on the ground of a breach of warranty, or a false and fraudulent representation in the same contract: (See *Blake vs Culver*, (6 *B. Monroe*, 528.) A physician called to visit a patient for fever, communicated to him small pox; it was competent to show this fact in mitigation of the recovery, and that for any demand in curing small pox or attention made necessary by that disease, there was no right to any recovery. *Piper vs Menifee*, 469.

See *Rents*.

AWARDS.

1. Awards not made within the terms of the submission are not binding. *McCawley vs Brown*, 133.

BAR BY FORMER RECOVERY.

See *Former Adjudication*.

BILLS OF DISCOVERY.

1. A bill filed to obtain a discovery of matter set up in a plea, filed when the plea is filed, should be allowed if the matter sought to be disclosed be material, and rest alone in the knowledge of the defendant. *Bohannon vs Combe*, 570.

BILLS OF EXCEPTIONS,

1. When spread upon the order book of the Court, are entitled to full credit, (*Hordin*, 166.) The signature and seal of the Judge must appear to every bill of exceptions not spread upon the record. *Allsup*, vs *Hassett*, 129.
2. Though the record state that a bill of exceptions was signed and sealed by the judge, and made part of the record; yet if the signature and seal of the judge be not in fact placed to the paper, it cannot be regarded as a bill of exceptions, and part of the record. *Ibid*, 130.

BILLS OF EXCHANGE.

1. A written acceptance made on the back of an order in these words, "I will see the within paid eventually" is a valid binding acceptance to pay forthwith, and an action lies for failing to pay. *Brannon* vs *Henderson*, 62.
2. The replevy of a judgment against the acceptor of a bill is no extinguishment of the bill, or the right to proceed vs the indorsers. *Bohannon* vs *Combs*, 579.

BILLS QUIA TIMET.

See *Corporations*, 9.

BILLS OF REVIEW.

1. Though a bill be not called a bill of review, yet if it describe the case fully and rely upon important facts discovered since the decree, and show that there was no negligence in not discovering them before the trial of the suit, and that the discovered facts will probably produce a different result; and it be sought to correct the former decree, and it has been treated by an inferior Court as a bill of review, it should be so treated in the Court of Appeals, though the first record be not expressly made part of it. *Bayse* vs *Beard's executors*, 585.
2. If the object of a bill be to enjoin a decree in whole or in part, or for refunding of money paid under a decree, it is, in effect, a bill in the nature of a bill of review, though it may not in terms pray for a review. *Bayse* vs *Beard's executors*, 588-'9.
3. The chancellor will not entertain a bill of review to litigate matters which might and should have been discovered and litigated on the first trial; and when the point involved has been decided by the Circuit Court and affirmed by the Court of Appeals. *Bayse* vs *Beard's executors*, 589.
4. If upon the hearing of a bill of review, it clearly appear that the complainant in the first suit had obtained a decree for a greater sum than he was entitled to, and the facts showing that a decree to that extent should not have been rendered rested in the knowledge of the complainant, and not of the defendant, the chancellor should perpetually enjoin the decree for so much as was unjustly decreed to complainant. *Id.* 593.

BONDS.

See *Appeal Bond*.

BOUNDARY.

1. When ejectment is brought to recover the possession of land described as all, the unsold land of a particular tract, it is incumbent on the plaintiff to show what had previously been sold, to show what land was conveyed. (*Litt. Sec cases* 81. 3, *A. K. Marshall*, 20.) *Weathers vs Payne*, 346.

BY-LAWS.

1. A power vested by the legislature in cities and towns to make by-laws and ordinances for their government and the regulation of their own police cannot be considered as a imparting, by implication, a power to repeal the laws of the State, or supercede them by any of its by-laws or ordinances: *March vs Commonwealth*, 29.

CASE.

1. One who employs the slave of another in a hazardous business, without the consent of the owner, is liable for any loss that may arise, though it may be the result of want of skill in the slave in the performance of the act that produced the injury. *King vs Shanks*, 415.
2. From the fact that a master occasionally permitted a slave to do jobs for his own profit, it cannot be inferred that he consented that he should be employed in the hazardous enterprise of swimming a horse. And the employment of a slave in such an undertaking was a wrongful act, rendering the person so employing him liable for any loss which might be regarded as the natural and proximate consequence thereof. *Ib.*, 412.
3. One who employs a slave to perform a service without the consent of the owner, is liable for the loss of the slave even without wilful misconduct or culpable negligence: (2 *Richardson's S. C.*, Rep., 455. 2 *Bay*, 464,) where the slave was induced to ride a race in which he was killed: See also (2 *Richardson's S. C.*, Rep., 613. *Shobert's Law Rep.*, S. C. 625.) *Ib.* 416.

CESTUI QUE TRUST.

A cestui que trust may claim and hold the same interest in property acquired by a trust fund as he held in the trust fund: *Moore vs Moore, &c.*, 663.

CHAMPERTY.

1. A conveyance made when there is an adverse possession in compliance with a contract of sale made when there was no adverse possession, is not within the champerty law. *Simons vs Gouge*, 164.
2. Land for which there is a judgment in ejectment, may be sold and conveyed without violating the law against champerty. (*Chiles vs Jones*, 2 *Dana*, 25.) *Batterton vs Chiles*, 354.

CITY OF LEXINGTON.

1. The city authorities of Lexington have the same power to suppress nuisances as the Circuit Court had before the change of jurisdiction to the City Court, unless the city ordinance change the punishment. *Wilson vs Commonwealth*, 4.
2. No prosecutor necessary to an indictment in the City Court of Lexington for a nuisance. *Ib.*, 5.

CITY ORDINANCES.

1. The courts of general jurisdiction will not *ex officio* take notice of the bye-laws and ordinances of courts of limited jurisdiction when revising their judgments, unless for the purposes of justice they must necessarily do so. (1 *Chitty's pleadings*, 252.) *March vs Commonwealth*, 29.

See *City of Lexington*, 2.

CLERKS.

1. By the act of 1810, (1 *Stat. Law*, 392,) clerks may be fined for charging and collecting illegal fees. *Oatts vs Jones*, 51.

COMMISSION AND FORWARDING MERCHANTS.

See *Presumptions*, 1.

See *Limitation*, 1.

COMMON CARRIERS.

1. Common carriers cannot avoid responsibility for their gross negligence or that of their servants and agents by any special agreement: (*Story on Bailments*, 336.) Though the bill of lading given by steam boats as common carriers may express the terms of responsibility, yet the expression that they are not to be liable for breakage, will not exempt them from liability, where there has been gross negligence. *Reno, &c., vs Hogan*, 63.

COMPROMISES.

1. A judgment entered upon a compromise may be enjoined by the chancellor, if there be *fraud accident, or mistake*, in obtaining the compromise: *Hake vs Hart*, 427.

CONSIDERATION.

1. A promise by a plaintiff in an execution to the defendant that he may redeem property upon payment of the debt for which it was sold without any other consideration than that of kindness to the defendant, if not known to the bidders, and has no influence upon the sale of the property, is not such a promise as the chancellor can enforce. *Blackburn vs Collins*, 20.
2. If such promise be binding, should not its enforcement be demanded by suit within 5 years? *Quere. Ibid* 23.
3. "The consideration of a contract is the material cause of the contract, without which, it will not be effectual or binding." "It is the reason which moves the contracting party to enter into the contract," if it fail entirely the chancellor may relieve. (10 *B. Monroe*, 40.) *Sireskey vs Powell*, 180.
4. If a contract be for a sale of personal property to be delivered, and the obligation to deliver forthwith, and there be no delivery, there is a failure of consideration. *Ib.* 181.
5. A promise made without consideration is not binding. *Proctor vs Keith*, 253.
6. No action can be maintained for services rendered in the character of concubine. It is against the policy of the law to encourage such conduct—*argu. McDonald vs Fleming, &c.*, 286.

CONTRACTS.

1. The contracts of persons of weak intellect, and thereby rendered liable to imposition, will not be enforced by the chancellor, if the facts justify the conclusion that the party has been imposed upon, circumvented or overcome by the cunning or undue influence of the other party. *Wilson vs Oldham*, 59.
2. The chancellor set aside a contract for the sale of a tract of land at about half its value, made by an old ignorant man, with a shrewd and artful man having great influence over the vendor. *Ibid*, 60.
3. A plea to an action of covenant for failing to deliver property at a particular time and place, must aver, and the proof show, that the obligor, by himself, or agent was at the place on the day fixed for payment, and there remained to the uttermost convenient hour of the day, ready to deliver; and that the obligee was not there, or refused to accept. (1, *Bibb*, 425. 2, *Ib.*, 269. 4, *Ib.*, 67.) *Cole vs Hollister & Ross*, 85.

CONVEYANCES.

1. A deed purporting to convey more land than the grantor had the right to convey, may be effectual to pass all he had the right to convey. *Armitage vs Wicklife*, 498.

CORPORATIONS,

1. In England could only be dissolved by surrender of their charters to the King and his acceptance. In Kentucky, should it not be by surrender to the legislature, or repeal?
A corporation cannot, by its own act, dissolve itself, and thereby avoid any responsibility incurred before such attempted dissolution. *Portland D. D. & I. Co. vs Trustees of Portland*, 79.
2. The legislature had a right to repeal the amendment to the charter of the Covington and Lexington Railroad Company, by which the citizens of Kenton county had the privilege given to them of voting a tax for the construction of said road, provided no act had been done by which a vested right had been acquired. *Covington & Lexington R. R. Co., vs Kenton Co., Court*, 150.
3. Though a vote had been taken, and thereby the County Court had acquired the power to subscribe stock in the road to some amount, but had not subscribed the stock to any amount, yet the Legislature had power to repeal the law, which suspended or destroyed the power to make the subscription thereafter. *Covington & Lexington R. R. Co. vs Kenton Co. Court*, 150.
4. Citizens of other States exercising corporate powers in Kentucky, granted by other States, are liable to taxation in Kentucky. *Commonwealth vs Milton*, 218.
5. The rights secured by the Constitution of the United States to citizens of the several States, relate to those fundamental rights which belong to the citizens of all free governments under their own constitutions. (4, *Washington's C. C. Reps.*, 380.) *Ib.*
6. It was not the purpose of the Federal Constitution to give to the States the right of making laws or conferring privileges to corporations to have force without the States where created without consent. (8, *Dana*, 112. 4, *B. Montes*, 90.) *Ib.*

CORPORATIONS—CONTINUED.

7. Corporations are not to be regarded as citizens. *Bank U. S. vs Deaux*, (5, Cranch, 84,) except for the assertion of rights lawfully acquired, and suing in the Federal Court. (*Louisville R. R. Co. vs Litson*, 2. *Howard*, 497. *Ib.* 527.)
 8. The legislature have the constitutional power to tax corporations of sister States exercising their corporate functions in Kentucky though similar corporations chartered by Kentucky are not taxed. *Ibid*, 228.
 9. The city of Lexington, under a power conferred by the Legislature, have the same power to levy a tax upon corporations of other States. *Ibid*, 230.
 10. The chancellor has jurisdiction by injunction to restrain corporations from an abuse of their corporate powers. *Dudley vs Trustees of Frankfort*, 614.
- See *By-Laws*, 1.

COUNTY COURTS.

1. The presiding judge of the County Court, as judge of that Court, has jurisdiction to direct the administration of insolvent estates on the petition of the administrator, &c., and to authorize the sale of lands when necessary to pay debts. *Graves vs Cook's administrator*, 125.
2. The County Court judge, by the 2d section of the act of 1851, had the power conferred on him which the county commissioners had by the act of 1849-'50. And his jurisdiction upon the subject of administrations, was co-extensive with the County Courts: and by the 16th section of the act aforesaid, the county judge, as judge of the County Court has the power conferred of settling estates of any value, and ordering the sale of lands when necessary to pay debts: He has a distinct jurisdiction as justice of the peace. *Ibid*, 126.
3. A presumption should be indulged in favor of a proceedings in the County Court requiring a majority of the justices to be present when it was done, that such majority was present. *Graham vs Blunt, in behalf of Graves County Court*, 244.

COUNTY LINES.

1. The creation of a new county, the lines of which divide a tract of land, does not have the effect of divesting a possession of any part of a tract of land which may lie in part in two counties. *Simon, &c., vs Gouge*, 160.

COURT OF APPEALS.

1. The decision of the Court of Appeals, settling the legal questions involved in the case and directing a new trial, is binding authority on the Circuit Court in a subsequent trial, and upon the parties. *Sims vs Reed and wife*, 53.

CURTESY.

1. The husband of a wife who was tenant in remainder, has not, during the life of the tenant for life, any such seizin as creates a tenancy by the curtesy, and if the wife die during the existence of the life estate, he has nothing in the land. (*Arch. Black.*, 124. 4. *Kent Com.*, 29.) *Mackey vs Proctor, &c.*, 435-'6.

DAMAGES.

1. In assessing damages in assumpsit in behalf of a physician for his medical services, the fact that he, at the time of rendering the service, was attending persons infected with small pox, and was notified that if such was the fact that his services would not be required, said he would not attend such patients, but did, in fact, attend them and communicate the small pox to his patient, was proper evidence to go to the jury to reduce his claim for services, in analogy to the doctrine recognized in *Culver vs Blake*, (6, *B. Monroe*, 528. *Piper vs Meniffee*, 467.

DEBT.

1. Lies, when a certain tax is imposed, for its recovery, or where a certain penalty is imposed by statute. *Portland D. D. & J. Co. vs Trustees of Portland*, 80.

DECREES.

1. Neither a decree directing the sale of land, nor a sale of the land, nor a decree determining the right to land, and a conveyance to be made, if no conveyance be in fact made, will have the effect to pass the legal title. (3, *Marshall*, 220-1.) *Fauntleroy's heirs vs Henderson*, 450.
2. Decrees for conveyances do not have the effect to pass the legal title to the estate decreed to be conveyed *Mummy vs Johnson*, 3, *Marshall*, 220.) *Fantle-roy's heirs vs Henderson*, 450.
3. A conveyance in obedience to a decree for a conveyance, may be presumed where there has been a continued possession in the person to whom the conveyance is directed to be made, but not where the possession continues with the other party. *Ibid* 451.

DECREES VOID.

1. A decree without service or process, actual or constructive, is void. *Madeira's heirs vs Hopkins*, 600

DECRETAL SALES.

1. As a general rule, a purchase at a decretal sale made by a Court of competent jurisdiction, is valid, unless the decree be void. (*Bustard vs Gates and wife*, 4. *Dana*, 38. *Lampton vs Usher's heirs*, 7, *B. Monroe*, 62. *Benningfield, &c. vs Reed, &c.*, 8 *Ib.* 104.) *Harrison vs Hord*, 472-3.
2. A sale of infant's real estate is not void because the bond required by the statute (2, *Stat. Law* 808) should be defective in form or in substance. *Ibid*.
3. Where a sale of infant's real estate had been decreed and made 28 years—all the purchase money paid, and possession held under the sale—held that no irregularity would be available in an action of ejectment by the heir. *Ibid*, 474.
4. The right of a purchaser under a decretal sale will not in general be affected, though the decree be erroneous; if it be not void. *Madeira's heirs vs Hopkins*, 602.

DEDICATIONS.

1. A dedication of ground in the interior of a town to public use, as a public square, by conveyance to the justices of the County Court, on condition that it be used as a public square, passed no title to the justices of the County Court upon the removal of the seat of justice, but a right vests in the trustees of the town for the benefit of the town for public purposes. *Campbell Co., Court vs Town of Newport*, 540.

DEEDS.

1. It is no objection to a sheriff's deed, or any other deed, at this day, that is not indented. The practice of indenting for identification has become obsolete in Kentucky *Ratcliffe vs Trimble*, 34.

DEEDS OF TRUST.

See *Frauds*, 2.

DEPOSITIONS.

1. It is a matter of discretion with the Court to permit the deposition of a witness to be taken a second time.
A deposition was taken by the party who desired to retake it, the witness was closely examined to the point in issue, displaying intelligence, coolness, and self-possession by her answers: held that the Court decided correctly in refusing leave to retake the deposition. *Todd's heirs vs Wickliffe*, 298.

DESCENTS.

1. Though the mother is not entitled to land descended to her children from their father, yet she is entitled to an interest in lands which they inherit from each other which descended from the father. (6 *J. J. Marshall*, 47.) *Renfro's heirs vs Taylor, &c.*, 404.
2. The provisions of the statute of 1795 regard only the kindred of the decedent disregarding the blood of the first purchaser, placing the *paternal* and *maternal* kindred upon the same footing. *Wells' heirs vs Hand*, 169.
3. Where an infant dies possessed of real estate, not derived from the father, leaving no mother, nor brother, nor sister, nor their descendants, the *paternal* and *maternal* kindred are entitled in equal moieties. (7. See *acts of 1790.*) *Ibid*, 170.
4. The same is the case where the estate descends from the grandfather to the infant. *Ibid*.
5. Though the 5 sec. of the act of 1796, (*Stat. Law*, 563.) does not in express terms declare that the persons therein named shall, upon the exclusion of the mother, inherit an infant's estate, yet it is necessarily implied that the brothers and sisters and others named shall inherit on the exclusion of the mother, *Renfro's heirs vs Taylor*, 404.
6. Where an infant having title to real estate, derived from the father dies without issue, half brothers and sisters by the mothers side will inherit the estate as heirs of the infant. (*Clay vs Cousins*, 1 *Mon.* 75.) *Griggby &c., vs Breckinridge*, 631.

DEVISES.

1. A devise of land and slaves to one and his heirs forever, but if he die without lawful heirs before the wife of the testator, then to the testator's wife for life and then to others—Held that the devisee took a defeasible fee not a fee tail. (3 B. Mon. 618.) *Northcut vs Whip, &c.*, 69.
2. Where a devise in fee is made determinable upon some particular event, and that event occur during the coverture, no right to dower or curtesy exists. (*Cruise Dig. title Dower, chapter 3.*) But where land is given to a man or a woman, and the heirs of his or her body, the surviving wife is entitled to dower and the husband to curtesy if issue has been born alive. (8 Cokes Rep. 34.) *Northcut vs Whip, &c.*, 72.

3. "I bequeath to C. S., M. E., S. F. and the children of R. F. Hughes, when they come of age or marry one tract of land &c. I also bequeath to C. S. when of age a negro boy, also to M. E. and S. F. Hughes, when of age." This property in the event of the death of any one or more of said children the survivors to inherit—Held that under these clauses of the will, if either devisee die before they come of age or marry, then the devise overtakes effect, but if the event do not occur before that period, then the title of the devise is indefeasible.

And the devisees took an immediate interest and right of possession upon the death of the testator defeasible only upon his or her death before marriage or reaching the age of 21. *Hughes vs Hughes*, 117, 18.

4. The same rules of construction should be applied in construing a will as to reality and personality where both are embraced in the same clause. *Ib.* 119.
5. Slaves bequeathed to be of a particular description, when the legatee arrives at the age of 21 years, should not be set apart and possession given until he arrives at the age of 21 years. *Ib.* 119.
6. The word "children," when used in last wills and testaments is not to be construed to embrace grand-children; unless there be something in the will requiring such a construction, a case in which they are considered as embraced by the term heirs. *Ib.* 121.
7. A devise to one for life and at the death of tenant for life the land devised to be sold and the proceeds divided among the testator's children, gives to the children a vested interest in the land to be enjoyed in future. (*A nolds executors vs Arnolds adm'r.*, 11 B. Mon. 89, *Williams on ex'rs.*, 767, 5 Dana, 434,) *Fields vs Hill will & Co.*, 519.
8. The intention of the testator as to the time when a devise is to take effect is the criterion by which to arrive at the time when it vests—to be determined by the rules established by adjudications for determining such questions. *Grigsby &c., vs Brackinridge*, 631.
9. A devise was made of lands to the widow of the testator until the son arrive at 21 years of age then to him absolutely, or if the mother marry then her interest to cease, without any devise over in case of the death of the son, or marriage of the mother before the arrival of the son to the age 21—Held that the son took a vested estate and the mother the right to the use until the arrival of the son at 21 or her marriage. *Ib.* 632.

DEVICES—CONTINUED.

10. Though a devise be made in terms which seem to create a future estate and import a contingency, yet such words will not be construed to create a contingency, when there has been a previous estate carved out of the fee, but be construed merely as referring to the period at which the possession is to be taken, and not to postpone the vesting of the estate. (*Fearne on Rem*, 242, 247, 7 B. *Monroe*, 623.) *Grigsby, &c., vs Breckinridge, &c.*, 633.
11. A devise to one not expressed to be for life, will pass a fee simple title, unless there be other provisions in the will to show that a life estate only was intended to be given, and by which construction effect can be given to the other parts of the will. *Carroll's heirs vs Carroll's heirs*, 642.
12. A devise was made to the wife of the testator of all his real and personal estate during her widowhood, "but should she marry then I desire that all my estate be equally divided among my eight children or the heirs legally begotten of their bodies, and if 'the wife die without marrying, the property to be equally divided between my children or the heirs above expressed.'" One child married and had one child and died before the death or marriage of the widow of the testator—Held that the grand-child had a right to the one 8th under the will of the grand-father. *Robb vs Belt and Milam*, 645.

See *Dower*.

DISORDERLY HOUSES.

See *Nuisances*, 12.

DISTRIBUTION.

1. The chancellor, on decreeing distribution of estates, should ascertain the distributive share of each one entitled, and state it in his decree. *Scarce vs Page, &c.*, 321.

DIVORCE.

1. A husband whose wife in society of others treats him with absolute contempt, and shows a preference for, and courts the company of other men, and against his remonstrances, abandons him for one year, is entitled to a divorce. *Watkinson vs Watkinson*, 211.

DOWER.

1. The wife is not entitled to dower in lands where the husband is entitled to the remainder in fee after the termination of an estate for life, and dies before the determination of the life estate. (*Arnold's heir, vs Arnold's administrator, &c.*, 8 B. *Monroe*, 204.) This principle does not apply to a remainder in slaves and personalty thus situated, but the administrator of the tenant in fee in remainder is entitled, upon the death of the holder of the life estate, to slaves and personalty, and the widow to dower and her distributive share. If there be no children of the husband, the widow is entitled to half the slaves for life, and half the personal estate absolutely. (*Tibbe vs Tibbe et al*, 7 B. *Monroe*, 112.) *Northcut, &c. vs Whip*, 67.

DOWER—CONTINUED.

2. In all cases where the husband is seized of such an estate in lands as that the issue of the wife may inherit, if any she have, as heir to the husband, the widow is entitled to dower, (See *Litt. on Tenures*, sec. 52,) whether any issue be born of the husband or not. (2 *Atkins*, 46. 3 *Bos. and Pul.* 654, in note, 25 *Geo. III.* 2 *Bingham*, 416, 1825. 2 *Simons*, 249, 1828. *Ball on Property*, 67 Vol. *Law Lib.* 272. *Bisset on Estates for Life*, 81, et seq. 42, vol. *Law Lib.*, side page 53.) *Northcut, &c. vs Whip, &c.*, 73-4-5.
3. A widow whose husband died seized of land is not deprived of dower by a suit to enforce a lien for the purchase money, brought after the death of the husband, to which she was not a party—to the extent of the payment made by the husband. *Williet vs Beaty*, 174.
4. If a widow be turned out of possession under a sale made to satisfy a lien for balance of purchase money, in such case she will be entitled to one-third of the value of rents from the time she is dispossessed. *Ib.*
5. A vendor's lien is first to be satisfied before the wife of the vendee can have dower in the land. But where the vendee executes his notes to the creditors of the vendor, receives a conveyance and gives a mortgage upon the land purchased and upon other property, the wife of the vendee is entitled to dower though the mortgage debts be not paid. (9 *B. Monroe*, 265.) *McClure vs Harris*, 265.
6. Where the vendee receives a conveyance and gives his notes for the payment of the consideration of land purchased, and instantly executes a mortgage to secure its payment, the wife of the vendee is entitled to dower upon his death, though the money due upon the mortgage remains unpaid. (4 *Monroe*, 339.) *McClure, &c., vs Harris*, 266.
7. The mother is entitled to dower in the real estate of an infant which descends to the father during the coverture; nor is she barred by having purchased the land of the grand-father of such infant, supposing him to be the heir entitled to the estate. *Renfro's heirs vs Taylor*, 406.
8. Neither the widow who is entitled to dower, nor her tenants occupying the mansion and premises of the husband, are bound for rents until dower be assigned. *Ib.* 407.

See *vendor's lien*.

EJECTMENT.

1. A defendant being proved to have been in possession of the premises in contest on the 2d day of the month, the jury might properly infer that the possession was continued up to the 14th day of the same month, the date of the service of the declaration in ejectment. *Ratcliffe vs Trimble*, 33.
2. Notice to quit held not to be necessary where a sheriff sold more land under an execution than was necessary to satisfy it and conveyed it, and defendant claimed title under the deed. *Isaacs &c., vs Gearheart*, 235.
3. The legal title is necessary to maintain the action of ejectment. *Fountainroy's heirs vs Henderson*, 458.

See *Boundary* 1.

EMANCIPATION.

1. Slaves emancipated by will which was admitted to record, and the office burned—Held to be entitled to their freedom upon parol proof of the contents of the will. *Dowry vs Logan*, 238.
2. The chancellor refused to give the hire to the negroes, except from the commencement of the suit, the defendant not appearing to have had notice before that period of the complainant's right to freedom. *Ibid.* 239.
3. A testator made his will in these words: "I emancipate and set free my several negroes here mentioned"—say Squire, Jack, &c., naming seven—"provided they give the Madison County Court good and sufficient security for their maintenance and good behavior, and if they should fail to comply with the above requisition, I give them all to Humphry T. Hill, son of Harrison and Patsy Hill, as slaves for life." Five of the slaves offered the security to the County Court in reasonable time: the executor refused to assent and the Court refused to take the bond: held that the offer by the will to the slaves was individually or collectively, and the County Court should have accepted the bond if the executor had assented, and that the executor ought to have assented, as no reason for withholding assent is shown. *Hill vs Squire, &c., of color*, 558.
4. Where an executor improperly refuses to assent to the discharge of slaves emancipated by will, before the County Court, the chancellor has jurisdiction to coerce the requisite assent. *Hill vs Squire, &c., of color*, 559.
5. When the assent of the executor to freedom is coerced by the chancellor, to slaves emancipated by will on condition, the right to freedom exists from the date of the valid offer by the slaves to comply with the terms of the will. *Ibid.*, 560.
6. Where slaves suing for freedom are hired out during the pendency of the suit, the benefit of the hire belongs to the emancipated upon the right being established. *Ibid.*, 561.

See *Slaves*.

ENTAILS.

1. There is no reason why the same words in a will should be construed differently in disposition of real and personal estate. *Moore vs Mourz, &c.*, 658.
2. The laws of Kentucky not authorizing an estate tail to be created, the Court should not presume that the citizen intended to create an estate which the law did not sanction. *Ibid.*

EQUITABLE INTERESTS.

1. A testator directed his property to be sold, and the proceeds divided, &c., and the part coming to his son to remain in the hands of the executor, to be disposed of by him as he might deem best for his heirs—held that this fund in the hands of the executors was liable to the payment of the debts of the son by the chancellor. (1 Stat. Law 443.) *Samuel & Johnson vs Ellis, &c.*, 481.
2. So a slave conveyed to one in trust, the proceeds of the hire to be applied to the maintenance of another during his life—held that the interest of the cestui que trust was liable to be sold under execution under the act of 1796,

EQUITABLE INTERESTS—CONTINUED.

(3 *Bibb*, 183. See *Cosby vs Ferguson*, 6 J. J. *Marshall*, 264,) where the chancellor subjected the profits of the trust estate, that being sufficient to pay the debts. See also *Pope's executors vs Elliot, & Co.*, 8 B. *Monroe*, 66—referred to in the case of *Samuel & Johnson vs Elliot &c.*, 482.

EQUITY JURISDICTION.

1. The chancellor has jurisdiction to set aside contracts made by weak minded individuals with cunning and artful persons possessing great influence over such persons. *Wilson vs Oldham*, 60.
2. Courts of equity may relieve against notes or bonds as well where there is a total, as where there is a partial failure of consideration. (10 B. *Monroe*, 40. *Streshly vs Powell*, 180.
3. The chancellor has jurisdiction to correct or relieve against the effects of mistakes of his agents. *Cosby's heirs, &c. vs Wickliffe &c.*
4. A commissioner was appointed by the chancellor to sell two thirds of an estate, but reported that he had sold the whole and the Court ordered its conveyance which was done, on bill filed and the mistake clearly appearing by the written certificate of sale, the chancellor properly corrected the mistake. *Cosby's heirs, vs Wickliffe, &c.*, 201.
5. The chancellor has the power to injoin perpetually a judgment entered upon a compromise if obtained by fraud accident or mistake. *Hahn vs Hart*, 427.
6. Where by a deed of trust or other instrument a beneficial interest in property of a fund is given, or in its issues and profits is created in terms or by implication for another, the property or fund is liable in equity to the demands of creditors. *Samuel and Johnson vs Ellis, &c.*, 483.
7. The chancellor has jurisdiction in behalf of one holding the legal title and the possession to quiet the title and possession by virtue of the act of 1796, (1 *Stat. Law* 251,) as well as upon general principles of equity. *Armitage vs Wickliffe*, 494.
8. The chancellor has the power in aid of a Court of law to prevent, by restraining order and injunction, a defendant in trespass from fraudulently disposing of his property so as to prevent the satisfaction of damages which a plaintiff expects to recover. *Cotrell vs Moody, &c.*, 501.
9. In such case where the bill alleged that a suit was pending at law—that complainant believed defendants guilty of the trespass—the amount which complainant expected to recover—his belief that the defendants were about fraudulently to dispose of their property to evade the payment of the damages, the allegations held to be sufficient to authorize the interposition of the chancellor. *Ib.*
10. The jurisdiction exercised by the chancellor in such cases is ancillary to that of the Courts of law, in analogy to the power exercised by the chancellor to preserve the subject in litigation from removal or sale until the question or legal right is settled at law. *Ib.* 502.
11. The chancellor has jurisdiction in behalf of one in possession of land to quiet his title against others claiming the land. *Dudley vs Trustees of Frankfort*, 612.
12. The chancellor has power to coerce an executor to assent to the freedom and liberation of slaves emancipated by will where he improperly withholds it. *Hill vs Squire, of color*, 361.

ESTATES.

See *Settlement of Estates*, 1, 2, 3.

EVIDENCE.

1. One who objects to the competency of a witness must show his incompetency. *Hamilton vs Summers*, 12.
2. Copies of records made out by a clerk are competent evidence in suits to which the clerk is a party, as well as in all other cases. *Ratliffe vs Trimble*, 32.
3. The fact that the plaintiff had been embarrassed for many years, and during that time in enumerating his resources to his friends had not been heard to mention the claim sued on, (a debt of \$500) now claimed from one who was always able to pay, held competent testimony to go to the jury to show that the debt if ever really due had been satisfied. *Marshall vs Marshall's Administrator* 460.
4. Evidence conducing to prove a fact in issue should not be excluded from the jury. *Ibid*, 463.
5. A sheriff's return that he had levied an execution upon property, is competent to prove the right of the sheriff to the possession of the property under the levy, in any suit brought by the sheriff to recover the possession. *Williams &c., vs Herndon*, 484.
6. Entries made in shop books, made by disinterested clerks, have in some cases been held competent evidence for the shop owners where the nature of the case is such as to render better evidence unattainable—and in some cases it has been extended to entries made by the party himself; though such evidence should be allowed with great caution, and never to prove the payment of any note or money due. (1 *Yeates* 347. 4 *Mass. Reports* 455. *Scarg. & Rawle* 231.) *Brannin vs Foree's Administrator* 508.
7. An entry made by a party himself of the giving of a note and the payment thereof, held to be incompetent evidence for his partner, after his death, of the payment of the note. *Ibid*. 609.

EXECUTIONS.

1. A sheriff by the levy of an execution upon property acquires such an interest therein, as authorizes him to maintain trover against any one who takes it out of his possession, or when he may have left it in possession of another upon his verbal promise to surrender it upon request. *Williams &c., vs Herndon* 484.

EXECUTION SALES OF LAND.

1. A sheriff cannot sell and convey more land than is necessary to satisfy the execution under which he sells, though the defendant in the execution consent to such sale and receive the overplus, after satisfying the execution. *Jacobs &c., vs Gearheart* 232.

EXECUTORS AND ADMINISTRATORS,

1. Paying usury claimed against their testator may as executors sue for its reclamation. Their right of action accrues from the time at which they obtain a credit in the settlement of their executorial accounts, and in a case where they

EXECUTORS AND ADMINISTRATORS—CONTINUED.

- gave their individual note to the creditor in place of that of their testator, from the date of such note. *Brent's Exor., vs Trebaugh* 83.
2. Executors and administrators can alone sue for a breach of covenant which occurs in the lifetime of the testator or intestate; but for such as occur subsequently to the death of the obligee, the heir must sue. *Brown's heirs vs Wilson* &c., 102.
 3. All persons who are capable of making wills may be executors, as well as some others: (*Williams on Exors.*, 112.) Poverty or insolvency is no objection. (*Ibid.*, 119.) *Berry vs Hamilton*, 193.
 4. An executor derives his authority from the will, and if he be one whom the law regards as competent to be an executor, the County Court have no right to refuse his qualification on account of any supposed defect of moral character. *Ibid.*

EXEMPTED PROPERTY.

1. The protection from execution given by statute to cloth manufactured in the family, extends to carpetings, though the thread may have been purchased and the weaving done by and in a different family. *Sims vs Reed & wife*, 53.
2. If property exempt from execution be levied upon by an officer, the defendant cannot use force to regain the possession; but he may regain it peaceably, and if he do so regain the possession, the officer cannot justify the use of force to take it. *Ibid.*

FEMES COVERT,

1. Who have not separate estate in real property, in Louisville, cannot become employers in the sense of the statutes of 1831 and 1834, by which a lien will be created on their real estate in favor of mechanics, material men, &c., *Fetter, &c. vs Wilson, &c.*, 91.
2. Since the act of 1846, (*Ses. acts of 1845-6*,) the right which the husband may acquire in the lands of the wife is not subject to sale to satisfy claims of mechanics and material men during the life of the wife, for improvements made thereon at the request of the husband, without it be by the consent of the wife, given by such writing as that act requires: nor can a house be sold separate from the land. *Fetter, &c., vs Wilson, &c.*, 93.
3. The general doctrine is that a *feme covert* can make no valid or binding contract—there are exceptions—as in regard to her separate estate, &c. *Johnson and wife vs Jones*, 329.
4. Slaves, since the statute of 1846, (*Ses. acts of 1845-6*, page 41,) which are the property of the wife upon her marriage, do not vest absolutely in the husband, as they did before that statute, but are placed upon the same ground as real estate, and can only be disposed of as real estate before the statute, unless it be by contract made jointly with husband and for necessities for the family. *Ibid.*, 329.
5. She cannot make an executory contract for the sale or purchase of land, except as authorized by law unless, she have a separate estate therein. *Id.* 330.

FEMES COVERT—CONTINUED.

6. If the husband, since the act of 1815-5 sell the slaves of the wife which are protected by that statute, they may be recovered by action of detinue. *Ib.*, 333.
7. The husband, since the passage of that act, can make no contract which will render the slaves of the wife responsible, unless in conjunction with the wife as provided for by that act. *Ib.*, 332.
8. An infant *feme covert* can make no conveyance of her lands which will be binding upon her or her heirs. *Mackey vs Proctor*, 4c., 434.

FINES.

1. The governor of Kentucky has no power, under the present constitution, to remit that part of a fine which the law does or may set apart to attorneys for the Commonwealth as compensation for prosecuting an offender. *Frazer vs Commonwealth*, 369.
2. Under the late constitution the Governor had power to remit the whole fine, though the statute provided that the attorney should have a half—held that under that constitution if the Governor remit part only, if that be less than half, the attorney had his right to the half of the original fine, if more than half, the attorney was entitled to the whole unremitted. *Ib.*, 370.

FORCIBLE ENTRY AND DETAINER.

1. One who has enters into possession of land, and takes a parol lease, may be proceeded against for forcible detainer, if he refuse to surrender the possession after the expiration of the lease. *Fogle vs Chaney*, 139.
 2. Where a lessee enters under a parol lease for more than five years, it ends with the five years, and the writ of forcible detainer lies after notice to quit. If the tenant then be regarded as tenant from year to year, a denial of the lessor's title, or an assertion of title by the tenant dispenses with the necessity of notice to quit, and forcible detainer may be brought. *Fogle vs Chaney*, 140.
 3. An entry upon land with the intent to cut timber, is not such a *forcible entry* as will authorize a suit for forcible entry and detainer; it is only a trespass: there is no divestiture of possession. *Grugher vs Wheeler*, 184.
 4. It is only where an entry is made with the intent to divest a previous possessor the forcible entry and detainer will lie. *Ib.*
 5. The person who is in possession alone can maintain the writ of forcible entry, and the landlord cannot maintain the writ for an entry upon his tenant. *Hudgins vs Temple*, 201.
 6. Though the tenant be holding over against his landlord when the entry is made upon his possession, yet the landlord cannot maintain the writ for forcible entry, though he may for forcible detainer against his tenant. *Ibid.*
 7. A purchaser of the equitable title of the lessor can maintain forcible detainer against a tenant entering under his vendor who holds over. *Goodlet vs Cleaveland*, 431.
 8. A tenant who denies the title of his landlord, is not entitled to notice to quit before being sued. *Ibid.*, 432.
- See Landlord and Tenant*, 3, 4.

FORMER ADJUDICATION.

1. That which has been once litigated and settled by the parties, and is shown by the dismissal of a suit by agreement of the parties appearing on the record, cannot be again litigated. *McCaully vs Brown*, 131.

FRAUD.

1. Where the consideration of a conveyance is fully adequate, the fraudulent intent of the grantor in making the conveyance will not affect the grantee, unless he have knowledge of that intent and participate in it. *Rutcliffe vs Trimble*, 39.
2. A deed conveying property in trust for the benefit of all the creditors of the grantor without giving preference to any—held not to be fraudulent. *Fisher vs Dinwiddie, &c.* 209.

FRAUDULENT CONVEYANCES,

1. Are binding upon the parties, though void as to creditors and purchasers. *Isaac, &c. vs Gearheart*, 235.

GAMING.

1. It is not necessary to constitute a betting that the hazard should be equal on both sides.
H sold to B a horse to be paid for after the election of members to the Convention. B was to pay for the horse one dollar for every vote that one of the candidates should receive over the other, but if he should not get more votes than the other, then nothing was to be paid for the horse—held that this was substantially a betting, and a note given upon a compromise by B to H, for money upon no other consideration could not be recovered. *Bevil &c. vs Hix*, 141.
2. Though betting on elections of members to the Convention is not specially provided for by statute, and no penalty attached to the act, it is against the policy of the law, and Courts will not lend their aid to enforce the collection of notes founded upon such consideration. *Ibid*, 142.

GIFTS.

1. A gift of slaves, though in writing, passes no title unless possession be delivered or the writing be properly recorded. (2 *Stat. Law*, 1480. 7 *B. Monroe*, 532. 5 *Dana*, 397. 7 *J. J. Marshall*, 235.) *Chadoin vs Carter*, 49. 285.

GOVERNOR.

See *Fines*, 1, 2.

GUARDIAN AND WARD.

1. The Courts of Kentucky have no authority to appoint guardians who have father living, unless they have property in the State. *Burnett vs Burnett*, 324.
2. A guardian in one State has no right to interfere with the property of the ward in another State without appointment from the authorities of the latter State; nor is a guardian in one State responsible to the authorities of any other State. The Courts of any State where the appointment was made have the exclusive jurisdiction of the subject. *Ibid*, 324-5.

GUARDIAN AND WARD—CONTINUED.

3. A statutory guardian has no right to convert the real estate of his ward into personality, or personality into realty, except subject to the ratification of the ward on arriving at age. (*Rees Dom. Rel.* 334, *in note*; *Kent's Com.*, 2 Vol. 250. See 1 *Rawle*, 256, *Contra.*) *Moore vs Moore, &c.*, 262.
4. But when the ward receives slaves the product of land sold by guardian, and held and enjoyed them after arriving at full age, it was held to be a ratification of the act of the guardian. *Ibid*, 263.

HABEAS CORPUS.

1. A decision against an applicant upon a writ of *habeas corpus* is not a bar to another writ or suit. *Argu. Maria vs Kirby*, 550. •

HEIRS.

1. Heirs who receive estate or money upon the compromise of a suit as heirs are liable for the same to the creditors of the ancestor through whom they claim. *Cosby's heirs vs Wickliffe*, 206.

HUSBAND AND WIFE.

1. The husband whose wife is entitled to an interest in slaves held by her mother as dower slaves, and who dies during the lifetime of the doweress is entitled to such slaves upon the termination of the dower estate. It was vested during the coverture. (1, *B. Monroe*, 152. 4, *Ibid*. 236. 5, *Ibid*. 556. 7, *Ibid*. 536. 9, *Ibid*. 95. 10, *Ibid*. 95. 3, *Littell*, 263, 4.) *Sanders' executors vs Sanders*, 42.
2. The husband has no power to dispose of the slaves of the wife since the passage of the act of 1846, if the marriage took place or the slaves came to the wife since that date; if he do dispose of them the possession may be recovered by action in the name of the husband and wife. *Johnson and wife vs Jones* 333.

IDIOTS AND LUNATICS.

1. "Persons incapable of acting for themselves though not idiots or lunatics have been permitted to sue by their next friend," (*Milford's Pleading*, page 30.) If not idiots or lunatics they may sue in their own names, and the addition of the words, by their next friend, cannot vitiate the proceedings. *Wilson vs Oldham*, 57. •

INDICTMENT.

1. An indictment charging that the keeper of a house permitted slaves unlawfully to be and remain about his house buying, tippling and drinking spirituous liquors, it is a good indictment. *Wilson vs Commonwealth*, 4.

INDORSERS,

1. Of bills of exchange are not released from liability by the replevy of a judgment against the acceptor. *Bohannon vs Combs*, 576.

INJUNCTION.

1. An injunction enjoining a judgment at law against the acceptor of a bill of exchange is no bar to a suit against the indorsers &c. *Bhannon vs Combs*, 563.
2. May property be awarded by the chancellor against the trustees of towns and cities to restrain the abuse of their corporate powers. (2, *St. J's Equity* 827, S. 9.) *Dudley vs Trustees of Frankfurt*, 612.

INSTRUCTIONS.

1. Where a conveyance is rescinded on the ground of fraud, the Court, in its instructions to the jury, should hypothecate its instructions upon all, not part, of the facts conducing to show fraud in the conveyance. *Futcliffe vs Trimble*, 87.

JURISDICTION.

1. In actions for torts, the damages laid in the declaration determine the jurisdiction of the Court. (*Singleton vs Madison*, 1 *B. & L.*, 342.) *Aulick vs Adams*, 104.

JURY.

1. No jury is necessary in an action of debt against a corporation for the non-payment of a tax, the amount of which is fixed by law, but the Court can give judgment for the sum fixed only, but not for any interest, unless a jury assessed interest. *Portland D. D. Co., vs Trustees of Portland*, 82.

JUS ACCRESCENDI.

1. The statute abolishing the *jus accrescendi* does not apply to conveyances made to husband and wife. *Moore vs Moore, &c.*, 663.
2. Land was purchased by a guardian with the funds of the ward and conveyed to her and her husband—held that upon the death of the wife, the husband did not succeed to the land. *Ib.*, 664.

JUSTICES OF THE PEACE

1. Have power to take recognizances of criminals to appear on the first day of the next term of the Circuit Court; but not for their appearance on any other day of the term. *Hosletter vs Commonwealth*, 1.
2. Qu. Since the statute law of 1837, (3 *Stat. Law*, 369,) would not a recognizance to appear on the 2d day of the term be valid? not decided. *Ibid.*

LANDLORD AND TENANT.

1. A tenant is bound for the stipulated rent, though the premises should be destroyed by inevitable casualty, (1 *B. & L.*, 536;) and an undertaking by a lessee to put the premises in repair will oblige him to repair fencing destroyed by a freshet. *Pactor vs Keith*, 236.
2. Where a lessor, by the terms of the lease, had a right to require a surrender of the premises in case of non-payment of the rent, and the lessee no right to surrender, a promise made by the lessor to repair fencing removed by a freshet was a promise without consideration, and not obligatory. *Ibid.*

LANDLORD AND TENANT—CONTINUED.

3. To enable a landlord to avail himself of his right to re-enter for the non-payment of rent, demand must be made on the day the rent is payable at the most notorious place on the premises, if no other place be designated. (*Tillinghents Adams*, 161-'7, *Bacon*, title rent, 26,) but when the right of re-entry it is stipulated for without demand, the tenant is bound to show readiness to pay the rent when due. (7 *Bacon*, title rent, 28.) *Ibid*.
4. A stipulation in a lease that the bare non-payment of rent for ten days after due, shall give a right to sue without notice, will be sufficient to dispense with the necessity of a demand or notice before bringing forcible detainer. *Echhart vs Bargess and wife*, 464.

LAND SALES.

1. A sheriff cannot sell more land than will satisfy the execution, and pass the legal title thereto, though he make the sale by the consent of the defendant in the execution. (5 *Dana*, 271. 6 *B. Monroe*, 37. 9 *Ib.*, 25.) *Isaac vs Gearheart*, 231.
2. The fact that the defendant in the execution authorized the sheriff verbally to sell the whole tract of land, (greatly more than was necessary to discharge the execution,) and received the overplus, did not confer upon the sheriff the power to convey the legal title to the land to the purchaser. *Ibid*, 232.

LEASES.

1. A lease of a tract of land without restriction as to boundary, extends to the whole survey. *Simons, &c. vs Gouge*; 159.

LEGACIES.

1. A legacy to be paid to the son of the testator on his arriving at 21 years old, to purchase stock for his farm—the son died before arriving at that age—held that the legacy was not vested. *Grigsby vs Breckenridge*, 636.

LEGISLATIVE POWER.

1. The Legislature have the power to take away, by statutory enactment, that which has been granted by statute; unless rights have been vested under the law before its repeal: Or to revoke an authority granted before any right has been acquired under that authority; and the repeal of a statute puts an end to all proceedings under it unless rights have been acquired under it which cannot be divested. (6 *Wendell*, 531. 1 *B. Monroe*, 402.) *Corrington, and Lexington R. R. Co. vs Kenton County Court*, 148.
2. An act of the Legislature giving to the people of a county the right to vote whether they will or will not be taxed for making a railroad, is a mere privilege, confers no right, and may be repeated by the legislature before any right had occurred under it. *Ibid*.

LESSOR AND LESSEE.

1. A lessee who obligates himself to put fencing in repair is bound to repair fencing removed by a freshet. *Proctor vs Keith*, 254.

LEXINGTON CITY.

1. An ordinance of the city of Lexington authorizing a fine of \$100 to be inflicted for a breach of the peace, in the city, does not repeal the common law which authorizes a fine, at the discretion of a jury by the authority of the City Court. *March vs Commonwealth*, 31.

LIEN.

1. A woman lived with a man as his housekeeper and concubine, advanced him money to pay for the lots which they occupied—held that she was entitled to a lien on the lots to the extent of her advances. *McDonald vs Fleming &c.*, 238.

LIMITATION.

1. The accounts of commission and forwarding merchants for money advanced and services rendered are not embraced by the 5 sec. of the statute of limitations. (2 *Stat. Law*, 1134,) limiting actions upon merchants accounts to one year. *Youngs vs Dobyne*, 9.
2. Where goods are sold on a credit for a stipulated period of time, limitation is no bar if the suit be brought within 12 months from the time the price became due. *Brent & Co., vs Cook*, 268.
3. That it was the custom of the vendors to wait 12 months with their customers, who bought goods of them, will not be sufficient proof of a contract to wait for that period with a particular individual, especially when the proof does not show that the parties had previously dealt with each other and knew the custom. *Ibid.*
4. Does not run against a suit to recover for surplus land conveyed through mistake; but from the time the mistake is or should have been discovered—when suit should be commenced within five years. (*Crane vs Prather, &c.*, 4 *J. J. Marshall*, 77—*Ervin vs Ware*, 2 *B. Monroe*, 65.) *Grundy's heirs vs Grundy*, 271,2.
5. Where husband and wife unite in the conveyance of land—the inheritance of the wife, and through mistake convey more land than was sold, no limitation commences to run against the right of the wife to recover for the surplus or compensation therefor, until the wife becomes discovert. *Id.* 271.
6. The limitation to an action to recover usury begins to run from the time of its payment, and the payment of a note containing usury by the transfer of notes of others is a payment. *Martin vs Martin*, 303.
7. If a plaintiff fail to sue out execution on replevy bond for more than 12 months after the same becomes due the surety stands released. *McCauley vs Offutt*, 388.
8. Or if for more than 7 years he is discharged under the act of 1838. *Id.*
9. A promise by one executor to pay the debt of the testator, is sufficient to destroy the effect of a bar by limitation and authorize an action against two executors or administrators or an action vs an administrator *de bonis non* in case of the death of the executor or administrator. (4 *Monroe*, 36, 6 *Mass. Rep.*, 429. *Angel on limitation*, 278.) *Northcuts adm'r., vs Wilkinson*, 409.

LIMITATION—CONTINUED.

10. Will the obtaining of an injunction and its pendency prevent the running of the statute of limitations, within the meaning and intention of the proviso of the 9 sec. of the statute of 1736. (*S. Ct. Law*, 1137.) *Quere. Bishannon vs Combs*, 553.

LOST RECORDS.

1. A bill in chancery brought to set up a will alleged to have been duly proved and recorded in the clerk's issue of the Fayette County Court—Held that though the testimony shows that a will was made proved and recorded, and the clerk's office burned and the original will and the record thereof destroyed, yet as no copy was produced, and the parol proof of the contents of the will too vague and uncertain to authorize the Court to say what were its provisions in respect to the property in contest, or that they were as complainants alleged the relief prayed for denied. *Todds heirs vs Wickliffe*, 303.

MALICIOUS SUITS.

1. It is a general principle that to enable a plaintiff to maintain a suit for maliciously suing him, it must be alleged that the suit is ended in his favor. *Cole vs Hawks*, 3 *Monroe*, 209. *Spring & Stepp vs Devore, &c.*, 654.
2. The opinion of the Court of Appeals directing that complainants bill be dismissed is not such a final determination of the case as will authorize a suit by the defendant in the bill for maliciously prosecuting the suit until the mandate be entered and the bill dismissed. *Ib.* 551.
3. No suit can be maintained for maliciously prosecuting a civil suit where the decision of the inferior Court has been in favor of the complainant, though that decision be afterwards reversed by the superior Court—Such decision of the inferior Court being evidence of probable cause, unless it be avowed and proved that the first decision was obtained through fraud. *Ib.*, 555.

MECHANICS LIENS.

1. A feme covert cannot be such an employer, under the acts of 1831, and 1834, in respect to mechanics liens in Louisville, as to render her real estate subject to liens of mechanics &c., unless she have a separate estate in the land, nor can the husband create a lien upon the wife's land by procuring improvements upon her real estate within the meaning of those statutes. *Fulter, &c., vs Wilson, &c.*, 91.

MILITIA FINES.

1. The County Courts have full power to adjust and settle, and allow or reject all credits claimed by collections of militia fines, and render judgment for the true balance, and the chancellor cannot overhaul and re-adjust such settlements when there has been no fraud accident or mistake—The remedy is by exception to the opinion of the Court in allowing or rejecting credits improperly. *Hahn vs Hart*, 428.
2. A collector of militia fines against whom judgment has been rendered, for failing to collect and pay over according to law allowed by the chancellor, credit for fines remitted by the Governor, though subsequently to the judgment. *Hahn vs Hart*, 429.

MORTGAGES.

1. Where there are several joint mortgagees, all are necessary parties to a suit to foreclose. *Hopkins vs Ward, &c.*, 135.
2. A *ni si* decree upon a mortgage should ascertain the sum to be paid, and it should be stated in the decree—it should identify the property to be sold in case of a decree for sale. *Ib.*
3. Though mortgaged property is not in general liable to sale under execution to pay the debt for which it is mortgaged yet if the sale be made at the instance or by the consent of the mortgagee, he will in equity be estopped to assert any right under the mortgage. (*Reed vs Hasley*, 2 *B. Monroe*, 253. *Wallace vs Tuttle*, 4 *Ib.*, 529. He who is silent when he should speak will not be heard when he would speak. *Morford vs Bliss*, 255.
4. If the debt for which land is mortgaged be paid it is a release of the mortgaged property and the legal title reverts in the mortgagor. (1 *Marshall*, 63, 7 *J. J. Marshall*, 257.)
5. So if the debt be released. See 2 *Marshall*, 103. Such will be the effect though there may then be a decree to sell the mortgaged property to satisfy the mortgage. *Armitage vs Wickliffe*, 427.

MORTGAGED PROPERTY.

1. Where the equity of redemption in property mortgaged was sold to satisfy debts secured by the mortgage at a fair price and was purchased by one of the mortgagees, and the other mortgagees released to the purchaser—Held that there was no such interest of the mortgagor remaining which could be subjected to the claims of creditors. *Bank of Kentucky vs Milton, &c.*, 341.

MOTIONS.

1. To authorize a county creditor to maintain a motion in his own name against a sheriff, his claim must have been allowed by the County Court and his name placed among the county creditors at the laying of the levy. (4 *B. Monroe*, 97.) *Graham vs Bount, for Graves Co., Court*, 243.
2. Motions against sheriff for failing to pay over money according to order should be in the name of the justices of the County Court. *Ibid.*, 244.

NEW TRIAL.

1. Where the finding of the jury is in accordance with the weight of the evidence no new trial should be granted, because the Court gave an instruction not directly upon the point upon which the case should turn: *Sims vs Reed and wife*, 54.
2. When a case depends upon a matter of fact which is to be decided by the jury upon the opinions of witnesses, the verdict will cannot be set aside: *Salmons vs Webb*, 368.
3. Where in ejectment the jury found "that the defendant was guilty of the trespass in the declaration mentioned and that the plaintiff recover the term yet to come in the declaration mentioned and one cent in damages:" Held that the finding was substantially good. *Ib.* 368.

See *Court of Appeals*, 1.

NOTICE.

1. County Court commissioners should give the notice directed by the statute of all settlements of estates, &c., made by them: *Scott's heirs vs Kennedy's executors*, 514.

NOTICE TO QUIT.

1. Is not necessary where the defendant has received a conveyance and claims title under the deed, which passes no title. *Isaacs, &c., vs Gearheart*, 235.
2. A tenant who denies the title of his landlord is not entitled to notice to quit before being sued. *Godlet vs Cleveland*, 432.
3. Ejectment cannot be maintained against a purchaser under a decretal sale which has not been perfected by a conveyance without notice to quit. *Harrison vs Lord*, 477.
4. A purchaser by parol let into possession cannot be ejected by his vendor without six months notice to quit. (3 *B. Monroe*, 46-'9 and 175. *John Rep.*, 330. 10 *Ib.*, 335. 5 *B. Monroe*, 453. 7 *J. J. Marshall*, 319. 7 *B. Monroe*, 316. 8 *Ib.*, 493.) *Harrison vs Lord*, 478-'9.

NUISANCE.

1. A house in which slaves are permitted to assemble and remain buying, tippling, and drinking ardent spirits is a disorderly house and a nuisance, (6, *B. Monroe*, 22,) and the consent of the owner of the slaves permitting the sale to them will not exonerate the keepers of the house from the penalty of the law. *Wilson vs Commonwealth*.
2. The selling of spirituous liquors to slaves is not unlawful unless done without permission of the owners or masters; but the assembling of slaves frequently in a house to tipple and drink spirits, is a nuisance. *Ibid*, 5.

OFFICERS

1. Levying process regularly issued by competent authority, are justified by the process. *Clay vs Sandifer*, 338.
 2. But if he exceed his authority, he is liable to the party injured, though not jointly liable with a plaintiff, who is liable for having illegally sued out the process. *Ibid*.
- See *Fines*, 1, 2.

PAROL CONTRACTS.

1. Though a parol authority to sell land may authorize an agent who makes the sale to give an obligation which might oblige his principal to convey, yet a parol authority by a defendant in an execution to the sheriff to sell more land than is necessary to satisfy an execution, will confer no authority upon the sheriff to convey the land. *Isaacs vs Gearhart*, 233.

PARTIES.

1. All parties having an interest are necessary to a suit for partition. *Batterton vs Chiles*, 354.

PARTIES AND PRIVIES.

1. All who are parties to a suit in chancery, are concluded by the matters decided in that suit, as to every character of claim they may have to the matter or thing in contest, and cannot be permitted to re-examine any right in a second suit. (*Mitford's Pleadings*, 145. 4 *Dana*, 84.) *Liggon vs Triplett*, &c., 284.

PARTIES IN SUITS AT LAW.

1. A misjoinder of plaintiff in assumpsit is fatal to the action; and judgment cannot be rendered for them. *Brent's executors vs Tivebaugh*, 88.

PARTITION.

1. All persons interested in the thing to be divided are necessary parties to a suit for partition. *Batterton vs Childs*, 354.

PARTNERS AND PARTNERSHIPS.

1. A note executed by one partner in the partnership name, is presumed to be for the purposes of the partnership, and it devolves upon the partner denying that fact to prove that it was not given for partnership purposes. *Hamilton vs Summers*, 11.
2. That the payee of a note given by one member of a firm in the name of the partnership, believed that it was for the individual purpose of the partner giving the note will not destroy its obligatory force against the other partners, unless it was in fact for the individual purposes of the partner giving the note, and not used in the partnership business. *Ibid*, 11.
3. In a suit against a surviving partner his admissions, direct or indirect, are evidence against him: though the admissions of one partner after the dissolution of the partnership is not evidence against the other partner. (*Daniel vs Nelson*, 10. *B. Monroe*, 318.) *Hamilton vs Summers*, 14.
4. Where one member of a partnership retires from the firm, with the consent of the remaining partners, leaving a sufficiency of assets to pay the debts, the law implies an undertaking to save the retiring partner harmless. (*Gow on Partnership*.) *Peyton vs Lewis*, &c., 358.
5. If one of two partners sell to a third person, with the consent of the remaining partner, and the new partner agree to save the outgoing partner harmless, the new firm are bound to appropriate the assets to the payment of the firm debts, and they misapply them, if they are individually bound to reimburse the outgoing partner for any payments made by him. *Ibid*.

PATENTS

1. Issued by the State of Virginia for lands lying in the forks of Sandy River subsequent to the first of October, 1790, did not confer the legal title to the patentee, though the same had been previously entered. Though the right to the land was secured by the compact in its then condition, no power was given by Kentucky to Virginia to grant the land. *Salmons vs Webb*, 365.

PHYSICIANS.

1. It is the duty of physicians attending persons laboring under infectious diseases, when called to attend others not so affected, to take all such precautionary means as experience has shown to be necessary to prevent its communication to the patients. (*Cherry on Con.*, 553, referring to 9 *Com. Rep.*, 203. 3 *Wells*, 355.) *Pijer vs Menifée*, 467.
2. A physician who communicates an infectious disease to his patient, is responsible in damages for the loss of time, expense, suffering, and danger to which the patient is exposed. *Argu. Ibid.* 468.

PLEADINGS AT LAW.

1. A plea to a suit on a note that it was *made and delivered on the Sabbath day* without any averment that the payee knew that the note was made on the Sabbath, or that the transaction which induced the giving of the note took place on the Sabbath day.—Held not to be a good plea. *Ray, &c., vs Catlett, Buck, &c.*, 536.
2. Nor is a plea in such case good, which avers that the plaintiff was a druggist and that the note was given for drugs sold on a particular day without averring that it was on Sunday. *Id.*
3. A contract completed on any other day, is not void because some of its terms were agreed upon on Sunday, (8 *Vermont Rep.*, 379) a note given on Sunday is not necessarily void: (10 *Mass. Rep.*, 319.) *Ibid.*, 537-7.
4. The fact that a matter pleaded occurred after the commencement of the suit, and consequently operated only as a bar to the further prosecution of the suit, does not preclude the party from pleading it with other pleas, without any effect upon them. (9 *Dana*, 193.) Additional pleadings are permitted in the discretion of the Court. *Bohannon vs Combs*, 570.

POSSESSION.

1. An entry upon part of a tract of land with the intent to take possession of the whole survey or boundary, gives possession to that extent, if not adversely held by another, but is limited to the line of the entry in which the survey is made. *Hord vs Waller*, (5 *Lit.* 52.) *Snyder, and Myers vs McKillops &c.*, 4 *Dana*, 456. *Roberts heirs vs Long*, 186.
2. An entry upon a tract of land lying in two counties gives a possession in the county where the entry is made, and an occasional entry in the other county to cut timber, &c., will not give a possession in the other county. 1 *Karsak*, 108—106. *Ibid.*, 197.
3. A judgment in ejectment does not change the possession of the land entered by the judgment unless a writ of possession be executed or a surrender of the possession. *Batterton, &c., vs Chiles*, 362.
4. Twenty years adverse possession of land not only tolls the right of entry of one having the legal title, and who labors under no disability, but it gives a right of entry upon which an action may be maintained to recover possession. *Dorch, &c., vs Thompson*, 380.
5. Adverse possession of slaves or personal property for five years not only deprives the former owner of all remedy for recovery, but it divests the legal

POSSESSION—CONTINUED.

- right, and vests it in the holder, who may maintain his action against the former owner for its recovery. (5 *Litt.* 282. 3 *J. J. Marshall*, 378, 374. 6 *Litt.* 278.) *Dorch vs Thompson*, 380.
6. But seven years possession of land by a junior patentee, or those claiming under him, does not expressly bar the right of the older patentee by the act of 1809, (*Stat. law*, 1141,) unless it be continued up to the bringing of the action by the older patentee, and if under the junior patent a possession be continued for seven years, and then abandoned, or become vacant, and the older patentee enter, the junior patentee cannot maintain ejectment on his previous seven years possession. *Ibid*, 380-1.
 7. A possession of land by a junior patentee for seven years does not toll the right of entry of the older patentee; but only gives to the junior patentee a defence against a recovery by the older patentee or those claiming under him whilst the possession continues. *Ibid*.
 8. Possession to be available under the act of 1809, to a junior patentee, must be by actual residence upon the land. *Ibid*, 383.
 9. A hostile possession may be changed into an amicable possession by the agreement of the parties, but to have that effect it should clearly appear that the title of the claimant is recognized as well as a right to the possession, and it must also appear that the tenant has the right to assume the relation—not owing allegiance to any other person or landlord. *Higginbotham vs Fishback*, (1 *Marshall*, 506.) *Botts vs Shields*, (3 *Litt.*, 34.) An agreement to become tenant is the only means by which he can become such to the vendor of the adverse title. *Fauntleroy's heirs vs Henderson*, 455-6.
 10. The intention of the parties is to govern in regard to the purchase of another title by one in possession. If the purchase is made to guard and protect a possession already acquired it cannot be with the view of becoming tenant of the holder of the title purchased. *Ib.*, 456.
 11. If a private citizen inclose a street or alley in a town and hold it for twenty years, claiming it as his own, a complete title will vest in him and those claiming under him, and he may maintain a bill in equity to quiet his possession if it be threatened by the corporation. *Dudley vs Trustees of Frankfort*, 617.
 12. A tenant was placed in the possession of a large tract of land, and died upon it, leaving a family. They were in possession for the landlord as the father had been, no act of abandonment appearing. *Simons, &c., vs Gouge*, 162.
 13. If one takes possession of land under the elder legal title, with intent to take possession to the extent of the boundary of the patent, he is in possession to the extent of the boundary, though another be in possession outside of the interference under a junior title. *Grughler vs Wheeler*, 184.

See *Leases*, 1.

See *Trespasses*, 4, 5, 7.

See *County Lines* 1, 2, 3.

VOL. XII.

PRACTICE IN CHANCERY.

1. When a cause is prematurely heard the dismissal should not be absolute; but without prejudice. *Bank of Kentucky vs Milton*, &c., 342.
2. An exhibit set out in a bill and stated to be genuine and that fact known to the defendants, and which is not denied in the answer, will be regarded by the Court as genuine. *Armitage vs Wickliffe*, 495.
3. The established rule in chancery proceeding is, that though the specific prayer of the bill be inappropriate, yet the Court will upon the general prayer, grant such relief as the allegations and proof show to be appropriate. *Bays vs Beard's executor*, 588.
4. Against the answer of infants defendants putting the complainant upon proof of the allegations of his bill, no decree can be rendered without proof. *Madeira's heirs vs Hopkins*, 600.

PRACTICE IN SUITS BY ORDINARY PETITION.

1. A verdict under the code of practice, sec., 371, finding "for the plaintiff the debt in the petition mentioned," held sufficiently certain. *Brannon and Smith vs Foree's administrator*, 509.

PRACTICE IN SUITS AT LAW.

1. A party may not be controlled by the Court in the order in which he offers his testimony, but if he offer testimony which is not shown to be competent when the evidence is concluded, it may be excluded by the Court. *Hamilton vs Summers*, 15.
2. Where there is an issue formed upon a plea in abatement and found for the plaintiff, the jury should assess the damages—the judgment being that the plaintiff recover—if the jury fail to assess the damages, and inquiry of damages by a jury should be ordered if it be necessary, and not a *venire de novo*.—*Withers vs Rudd*, 112.
3. The Court may properly refuse to give an instruction which is abstract, though the principle of law may be correctly stated, or to give a multiplicity of instructions embracing the same legal principle, and give one or more in its discretion, embracing the legal questions involved in the case. *Steamboat Blue Wing vs Buckner*, 249.

See *Evidence*, 1, 2.

See *City Ordinances*, 1.

PRACTICE IN THE COURT OF APPEALS.

1. The Court will not reverse at the instance of a complainant, though the case was prematurely heard, all the proper parties not being before the Court unless a proper case is made out for relief. *Rice vs Downing*, &c., 46.
2. The Court will not grant plaintiff a new trial where his declaration shows no cause of action. *Brown's heirs vs Wilson*, &c., 103.

PRESUMPTIONS.

1. The consignment of goods to a commission and forwarding merchant, evidenced by directions on the packages, and the delivery of them by the carrier to

PRESUMPTIONS—CONTINUED.

the consignee, and the fact that the packages were on the usual route to the residence of the owner, creates a presumption that the consignment to the commission merchant was by the direction of the owner, and unless rebutted by other facts, creates a liability on the part of the owner to pay advances, commissions, &c., to the commission merchant. *Young vs Dobyns*, 10.

2. If a note be given by one of a firm in the firm name, the presumption arises that it was for the purposes of the firm, and it devolves upon the person denying the presumption to rebut it by proof. *Hamilton vs Somers*, 11.

PRINCIPAL AND SURETY.

1. The land of the surety was sold to satisfy the debt of his principal, and being redeemable, the surety gave to his own creditor a mortgage upon the land sold, which was purchased, and the land sold to pay the debt of the surety, the execution purchaser and mortgagor, being parties to the bill to foreclose—held that as all the parties to the suit to foreclose were bound by what was therein decided, that the surety had no claim upon his principal, as his land once sold to satisfy the debt of his principal, had again been sold to satisfy his own debt. *Jarris vs Whitman, &c.*, 99.
2. A joint judgment was rendered against Crow & Harrison, sureties of Kincheloe, Harrison, replevied the debt with Murphy and others sureties—held that Crow, as an original obligor with Harrison in the note and judgment, was not the principal of the sureties in the replevy bond, and was not bound to contribution, unless they show the insolvency of Kincheloe, and a right to be substituted to the right of *Harrison vs Crow* for contribution. *Crow vs Murphy, &c.*, 444-5.

RECOGNIZANCES.

1. Justices of the peace have power to take recognizances for the appearance of those charged with criminal offences on the first day of the next succeeding Court, but not for their appearance on any other day of the term. *Hostetter vs Commonwealth*, 1.

RECORDS.

1. The copy of a record made out and certified by a clerk of a Court is competent evidence in suits to which the clerk is a party as well as suits between other persons. *Ratcliffe vs Trimble*, 32.
2. A paper not named in the pleadings of the parties, but exhibited in the brief of counsel, cannot be regarded by the Court as part of the record. *Batterton vs Chiles*, 353.

See *Lost Records*, 1.

REDEMPTIONS.

See *Considerations*, 1, 2.

RELEASES.

1. A release to a mortgagor for the debts which the mortgage was intended to secure, is a release of the property mortgaged. *Armitage vs Wickliffe*, 496.

REMAINDERS.

1. A vested interest in remainder in land may be subjected to sale by a decree of the chancellor to satisfy the debts of a non-resident debtor. *Fields vs Hallowell, & Co.*, 537.
2. A remainder may be valid to take effect upon the determination of a particular estate, and vest before the happening of the event which gives the right of possession. When a vested remainder rests upon good title, and not upon the defeasible title of the particular estate, it will be valid though the particular estate be defeated. (*Coke Litt.*, 298. A.) *Grigsby & c. vs Breckenridge*, 634.

RENTS.

1. Where the children of a testator permitted their mother (to whom a life estate in the plantation of the deceased husband was given by will) to enjoy land, adjacent to the land in which the life estate was given and acquired after the date of the will—held that consent should be presumed, and no right to rent exist. *Ross vs Ross*, 439.
2. Assumpsit for use and occupation does not lie, unless the relation of landlord and tenant has existed, and not then at the common law, unless there had been an express promise at the time of the demise. The rule has been so far relaxed as that a recovery of rent has been allowed upon *implied assumpsit*; and still the relation of landlord and tenant must have existed—A vendee entering under his purchase is not such tenant as in assumpsit is liable for use and occupation. (See 6 *Johnson's Rep.*, 46—13, *Ib.*, 49.) *Rogers vs Wiggs*, 506.

REPLEVIN.

1. Since the act of 1842, (3 *Stat. Law*, 503,) it is not necessary upon bringing an action of replevin to file any affidavit of the value of the property sued for in replevin. *Aulick vs Adams*, 105.

RES ADJUDICATA.

See *Parties and Privies*, 1.

RESCISIONS.

1. When a suit in chancery is brought by vendee for the rescision of a contract, if the vendor has any claim for rents, it must be set up in that suit: he will not be permitted, after a rescision of the contract in chancery, to come into a Court of law to recover rents for the occupancy of the land by the vendee under his purchase. *Rogers vs Wiggs*, 505.

SETTLEMENT OF ESTATES.

1. The statute which directs commissioners to give notice to the parties interested of the time &c., at which settlements will be made, is only directory to the commissioners, and will be presumed to have been given unless disproved; and a settlement without notice is not void. *Scott's heirs vs Kennedy's executors*, 512.

SETTLEMENT OF ESTATES—CONTINUED.

2. Though it is proper that all reports of settlements should show that notice had been given, or if not given, the reason why it was not given. *Ibid*, 515.
4. An order of the County Court confirming the report of commissioners of settlement of an estate with the administrator or executor, is not such a final order as will authorize a writ of error thereupon to the Court of Appeals. (*Judge Hise dissenting.*) *Ibid*, 515.

SHERIFFS.

1. There is no law for any allowance to a sheriff for a return of not found on a subpoena in chancery. *Oatts vs Jones*, 50.
2. The statute of 1828, (2 *Stat. Law*, 702,) authorizes a fine against a sheriff for issuing an illegal fee bill, or fee bill containing an illegal charge, to be inflicted by the Circuit Court upon motion, but does not embrace the case of collecting on illegal charge where no fee bill has been issued. *Ibid*.
3. A deputy sheriff who obligates himself to collect monies as sheriff and pay over according to law, and who fails to do so, is liable to an action by his principal, so soon as he has failed to do so; though the principal, has not been sued himself, but if he be sued and pay the judgment, he is entitled, in a suit against the deputy, to recover all the damages to which he has been subjected by the failure of the deputy. (3 *B. Monroe*, 70.) *Coulter vs Morgan's adm'r.*, 279.
4. A sheriff is not liable for interest on a balance due for county levies collected but from the date of the judgment rendered against him. *Ibid*, 281.
5. —By their official bond are bound not only to perform all the duties imposed on them, by law at the date of their bonds, but every additional duty which may be afterwards imposed by law, and a deputy who binds himself to his principal to perform the duties of sheriff, is bound to the same extent. *Coulter vs Morgan's adm'r.*, 282.
6. A sheriff, to whom a decedent's estate has been committed by the County Court for administration, is liable in a suit in chancery to distributees, &c. (1 *Monroe*, 59,) and his sureties in his official bonds are responsible with him. *Scarce vs Page &c.*, 315.
7. The County Courts have the power under the 57th sec. of the act of 1797, (1 *Stat. Law*, 670,) to commit the estates of decedents to the hands of the sheriff as well where the administrator is removed, as where none has ever been qualified, and the sheriff and sureties in his official bond, will be liable to distributees, &c., for any unfaithfulness in the administration. *Ibid*, 318.
8. If the deputy sheriff take charge of an estate committed to the sheriff for administration; the principal and his sureties are responsible as if the latter had done it himself. *Ibid*, 320.
9. The sheriff is entitled to a fair compensation for his services in administering estates committed to his charge, and is chargeable with all claims due the estate, unless he shows they were uncollectable. *Ibid*, 321.

SHERIFF'S RETURN.

1. A sheriff's return that he had levied an execution upon property, made before suit brought for the recovery of the property, is competent evidence to prove the levy in any suit brought by the sheriff to recover the property from one who holds the property against the sheriff. *Williams, &c., vs Herndon*, 484.

SHERIFF'S SALES OF LAND.

1. The Sheriff returned upon an execution that he had levied the same upon all the unsold land in the patent of David Jamison for 5,000 acres, supposed to be 1100 acres more or less, and that the same was sold, and he conveyed "all that tract or parcel of land lying within the patent of David Jamison for 5,000 acres, situated in Harrison county, &c., to which N. B. Coleman, at the time of his death, was entitled, supposed to be 1100 acres," is not such description of the land sold as will authorize a recovery in ejectment without further proof showing what was sold, and the position of the 1,100 and the remaining 3,900 acres, constituting the whole 5,000 acres. *Withers vs Payne*, 345.

See *Land, Sales of* 1, 2.

See *Execution Sales of Land*, 1.

SLAVES.

1. Though a State may have the right to declare the condition of all persons within her limits, the right only exists whilst the persons remain there. She has not the power of giving a *status* which will adhere to the person everywhere, but upon their return to the place of their domicile, they will occupy the former position: if a slave, the condition of a slave, if held as such before, if their sojourn in the State was for a temporary purpose only. (*Graham vs Strader*, 7 B. Monroe, 635. *Collins vs America*, 9, *Ib.*, 365.) And the effect of the removal of a slave into a free State, who returns with or to his owner, is to be determined by the laws of Kentucky, not by the laws of other States. *Maria vs Kirby*, 545.
2. The statute of another State declaring slaves brought into such State free, though brought there for a temporary purpose only cannot be enforced in Kentucky. *Ibid*, 348.
3. A slave was taken to Pennsylvania by her owner, and there upon a *habeas corpus*, declared to be free with liberty to go where she pleased; she came back to Kentucky with her owner—held that the decision of the judge in Pennsylvania, upon the *habeas corpus*, was ineffectual to show the right to freedom in a suit for freedom brought in Kentucky, especially as the writ of *habeas corpus* was not sued out by her request. *Ibid*, 349.

See *Case* 1, 2, 3.

See *Husband and Wife*, 1, 2.

SPECIFIC PERFORMANCE.

1. The chancellor will not decree a specific performance unless the consideration be paid. *Madeira's heirs vs Hopkins*.

SPIRITUOUS LIQUORS.

1. The general law regulating towns in Kentucky, confers no authority on the trustees to grant licenses to retail spirituous liquors. *Commonwealth vs Voorhies*, 362.
2. Nor does the 12th section of the act of 1849, (*Ses. acts*, page 47,) confer any such power except to the towns theretofore authorized to grant such licenses *Ibid*, 343.

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STEAMBOATS.

1. A vessel approaching a landing upon a river, by day or by night, should exercise such care as not to come in contact with other vessels, which are stationary at such landing, whether there be lights on the stationary vessel or not. *Steamboat Blue Wing vs Buckner*, 251.

SURETIES.

1. A surety who pays the debt of his principal has a right in equity to be substituted to all the liens and securities which the creditor had. (1 *Story's Eq.*, 478. 2 *John Chy. Rep.*, 560-4. *Ib.*, 123.) But this right only accrues upon the payment of the debt, when the debt becomes due—By his bill in equity he may compel the creditor to enforce his demand against the principal. *Rice vs Downing, &c.*, 45.
2. A surety in a replevy bond upon which an execution had issued and was in the hands of the sheriff agreed that the execution might be stayed by the sheriff for any length of time the plaintiff might direct. The plaintiff directed the sheriff to stay the execution in his hands, upon the written legal consent of the parties to the execution being produced; the plaintiff failed to issue any other execution for more than 12 months—Held that the surety was discharged—and as no execution was issued for more than 7 years, the surety was discharged on that ground also. *McCauley vs Offutt*, 388.
3. The pendency of a suit by the creditor against the principal debtor to enforce a lien by the creditor against the debtor, and which the debtor resists will not excuse the creditor for failing to sue out execution on the judgment; but if he fail for twelve months the surety will be released under the act of 1838. *Ib.*, *Craig vs Graham*, 401.
4. Though an execution on a judgment against principal and surety be returned "no property found," yet the failure to sue out another execution within seven years will operate a release of the surety under the statute of 1838. *Craig vs Graham*, 401.
5. One surety has no right to call upon his co-surety for contribution unless he show the insolvency of the principal, which he cannot do while he has effects of the principal in his hands. *Crow vs Murphey, &c.*, 445.
6. A surety of an acceptor of a bill of exchange in a replevy bond or injunction bond given to stay the judgment, and who pays the judgment, has no claim against the indorser of the bill for contribution or remuneration, such surety is not the surety of the indorser, nor has he any right to be substituted to the right which the holder of the bill once had against the indorser. (*Patterson vs Pope*, 5 *Dana*, 241, approved in *Kouns vs Bank of Ky.*, 2 *B. Monroe.*) *Bohannon vs Combs*, 572 to 577.

SURETY AND PRINCIPAL.

1. A surety in an injunction bond injoining a judgment which had been replevied, has no claim upon the surety in the replevy bond for contribution after paying the debt, when he became surety at the instance of the principal debtor alone, and not the surety in the replevy bond. *Brandenburg vs Flynn's adm'r.*, 393.
2. A surety in a replevy bond is not a co-surety with a surety in an injunction bond and not liable to contribution; on the contrary, the prior surety has a right to be substituted to the rights of the creditor against the subsequent surety to the full amount of which he may be compelled to pay. (*Parson's vs Braddock*, 2 *Vern.*, 603. 5 *Dana*, 244, 2 *B. Monroe*, 305. 12 *Ib.*, *Bohannon vs Combs.*) *Brandenburg vs Flynn's adm'r.*, 393.

SURPLUS LAND.

1. It is immaterial whether a sale of land be by the acre or in gross, a Court of equity will relieve where the parties labored under a palpable mistake as to the quantity, and that quantity is beyond what it may be inferred the parties intended to risk. *Grundy's heirs vs Grundy*, &c., 270.
2. The measure of compensation to the vendor for surplus land conveyed should be the price per acre for the land conveyed and interest in the discretion of the chancellor under the circumstances of the case—or a reconveyance of the surplus as equity might seem to require, and rent. *Rogers vs Garnett*, 4 Monroe, 271. *Merriwether vs Lewis*, 9 B. Monroe, 163. In this case, the Court gave interest from the filing of the bill. *Grundy's heirs vs Grundy*, 276.

TAXATION.

See *Corporations*, 3, 4, 5, 6, 7, 8.

TOWNS.

1. The general laws regulating towns in Kentucky, give no authority to the corporations to grant licenses to retail spirituous liquors. *Commonwealth vs Vorhies*, 362.
2. The 12 sec. of the act of 1849, (*Sess., acts*, 1847,) has application alone to the cities and towns which at the passage of that act, had authority to grant licenses to retail spirits, that act confers no new authority to cities or towns to grant licenses. *Ibid*, 363.

See *Dedications*, 1.

TRESPASS.

1. A plaintiff who sues out process of attachment improperly, is not liable jointly with the officer who transcends his authority in levying an attachment; unless he direct or sanction the act of the officer, nor is the officer liable jointly with a plaintiff who improperly sues out an attachment. *Clay vs Sandifer*, 339.
2. One standing upon his own ground may commit a trespass upon the land of another by throwing stones, and doing an injury to the house of another, or by reaching over with a pole or other instrument, doing an injury upon the land of another. *Shean vs Withers*, 441.
4. Where one joins his fence to another, and it is acquiesced in for a number of years the former will be regarded as a tenant from year to year, and the latter will not be justifiable in disuniting the fencing to the injury of the crop of the former without being guilty of a trespass. *Ib.*, 442.
4. The plaintiff to maintain trespass *quere clausum fregit*, must have the possession at the date of the trespass. An entry under a junior patent outside of the interference with an elder patent does not give a possession of the interference, though the entry be made with the intention of taking possession of the whole tract covered by the junior patent. But a possession under the elder patent, gives possession to the extent of the boundary of the patent to the extent of the county lines of the county in which the entry is made except such part as is actually possessed by others. *Simon, &c., vs Gouge*, 1589.

TRESPASS—CONTINUED.

5. An entry upon a possession held under the elder patent, by a junior patentee within the interference, does not have the effect of divesting the possession of the elder patentee, or those holding under him, beyond the actual inclosure, though the junior patentee may have been previously in possession outside of the interference claiming to the extent of the junior patent. *Ibid*, 189.

TROVER.

1. A sheriff may maintain trover for property upon which he has levied an execution, against any one who may take the possession, or with whom he may have left it upon his verbal promise to surrender it upon request, if he fail to do so. *Williams, &c., vs Herndon*, 484.

TRUST ESTATES.

See *equitable interests*, 1, 2.

TRUSTS AND TRUSTEES.

1. A fund was placed in the hands of two individuals as trustees who undertook jointly and severally to use the same prudently and profitably to pay the debts of the grantor and support him, and divide the remainder in six months after his death between his two children—Held that the trustees, who divided the fund when received, should each be charged with the amount received with interest thereon at rests of two years—when disbursements were made they, with interest from the time of the payment, should be credited, and a joint decree rendered against the trustees for the balance found due. *Greening vs Fox*, 189.
2. Trustees who received a fund under an undertaking to use it prudently and profitably, allowed a compensation of five per cent. for trouble and responsibility. *Ib.*, 190.

TRUSTEES OF TOWNS,

1. Though the trustees of towns and cities have the power to keep open the streets and alleys, they have not the right in the exercise of that power to enter upon the property of others. *Dudley vs Trustees of Frankfort*, 614.
2. The trustees of Frankfort may maintain trespass for injuries done to streets and alleys. *Ibid*.

USE AND OCCUPATION.

See *rents*, 1, 2.

USURY,

1. Paid by executors may be reclaimed by suit in their names as executors. *Brents executors vs Tivedaugh*, 89.
2. One who pays usury by the transfer of notes of others may forthwith sue for and reclaim the usury so paid, and limitation to a suit for the usury then begins to run. *Martin vs Martin*, 307.
3. A surety on a note which contains usury, and which is paid by his principal cannot sue for and recover the usury. *Ibid*, 308.

VENDOR'S LIEN.

1. The lien of the vendor is superior to a claim for dower of the wife of the vendee. *McClure, &c., vs Harris*, 264.
2. But when the vendee receives a conveyance and gives his notes to third persons for the price, and a mortgage on the land and other property, to secure their payment, the widow of the vendee is entitled to dower whether the debts due upon the mortgage are paid or not. *Ibid*, 265.
3. The acceptance by the vendor of other or additional security for the purchase money is a waiver of his equitable lien for the purchase money. *McClure, &c., vs Harris*, 265.
4. Where the vendor makes a conveyance, and a mortgage be immediately executed the wife upon the death of the husband, is entitled to dower, though the price secured by the mortgage be not paid. (*Teva vs Steel*, 4 *Monroe*, 339.) *McClure, &c., vs Harris*, 266.

VENDOR AND VENDEE.

1. The lien of the vendor for the purchase money due for land, passes to the assignee of the notes for the purchase money and is extinguished when the note is paid. *Wilder, &c., vs Smith*, 95.
2. Where land has been conveyed and the deed expresses upon its face to be in consideration of a sum paid and "secured to be paid," it is not a sufficient ground for withholding the purchase money from a subsequent vendor that a release of the lien apparent in such deed is not made by the first vendor—when there is no allegation that any lien is asserted or exists for the part of the price said to be "secured to be paid." *Wilder, &c., vs Smith*, 96.
3. A vendor who holds a lien for land sold, may at the instance of a sub-vendee of part of the same land be required to enforce his lien if the same be due, upon the part of the land unsold by the first vendee to the relief of the part he has purchased. (*Story's equity*, 594.) *Ammerman vs Jennings, &c.*, 137.
4. A purchaser of property, by executory contract let into possession in conjunction with the vendor, is bound to risk such injuries as may result from casualties unless there be an express contract to the contrary, and is entitled to any benefit which may accrue to the estate in the interim. (*Sugden on vendor's*, 174.) *Johnson and wife vs Jones*, 328.
5. A vendee is presumed to know the derivation of the title of his vendor which the latter holds under a decree against infant and non-resident heirs—the rule *caveat emptor* applies to such a purchaser. (4 *Dana*, 48, 9 *B. Monroe*, 230.) *Madeira's heirs vs Hopkins, &c.*, 601.
6. If a contract for the sale of land be executory on the part of both vendor and vendee, the writing, to authorize the chancellor to decree a specific performance, should show what are the terms of the contract to be performed by each party, without the necessity of a resort to parol proof. (*Kay vs Casey and 6 B. Monroe*, 101.) *Madeira's heirs vs Hopkins*, 604.
7. The chancellor will not decree a specific performance of a lost writing unless the proof shows that the writing contained what would authorize the chancellor to decree a specific performance if the writing was produced, without the aid of parol testimony. *Madeira's heirs vs Hopkins*, 605.

VENDOR AND VENDEE—CONTINUED.

8. Where a sub-vendee holds possession of land and improves, and the contract with the first vendor, cannot be specifically executed, he will be accountable for rents, and entitled to compensation for the improvements at the time of the assessment, and a lien on the land so far as they exceed rents paramount to that of his vendor for purchase money paid. *Madeira's heirs vs Hopkins*, 6078.

WARRANTY.

1. A slave was sold by W to S, upon which G held a mortgage, who brought suit to foreclose. S gave a bond for the delivery of the slave to be sold in case his sale was decreed, but failed to do so when required. G sued upon the bond and recovered the amount of the mortgage debt and costs of the suit in chancery and at law—held that W was not liable upon his covenant of warranty of the slave for the costs of the suit at law, but only for the amount of the mortgage debt and costs of the suit in chancery to foreclose. (5 B. Monroe, 341.) *Western vs Short*, 155.

WILLS.

1. In the construction of wills, the intention of the testator, if possible, must be arrived at. *Webb's heirs vs Webb's heirs &c.*, 46.
2. In a will is this provision: "As the tract of land I propose to give to my son, Wm. S. Webb, I have lent to his mother during her widowhood, I therefore reserve to my son William one-half of the rent or profits of the tract hereby given to my son Richard, until my son William can get possession of the land I have lent his mother." Wm. S. Webb having died during the life of his mother, without issue—held that his interest in the rent ceased at his death. *Ibid*, 48.
3. One whose mind is so impaired by age and infirmity as to be subject to the control of his slaves around him, is not competent to make a will—circumstances stated which lead to the conclusion that the testator was incompetent to make a will, and under the influence of his slaves to whom he gave freedom. *Minor's heirs vs Thomas*, &c., 107-8-9.
4. If the testator acknowledge the will before signing it at the conclusion, (his name being in the body thereof,) with the intention to publish it, and it be witnessed by one witness, in his presence, and afterwards sign his name at the conclusion, and it be witnessed by another witness in his presence, it is a valid execution of the will. *Allen, &c., vs Everett, &c.*, 378.
5. —Do not pass lands acquired by the testator after their date, unless there be terms used in the will which clearly show an intention to pass such after acquired lands. *Ross vs Ross*, 438.
6. Though a testator well understand what he is doing—the will written according to his dictation—distinctly read, sanctioned, and signed by him; yet if not attested by two or more witnesses in his presence, it will not be effectual to pass lands and slaves. (*Stat. Law*, 1537.) *Orndoff vs Hummer*, 622.
7. Though a will be signed and acknowledged by the testator before the witnesses, yet if the attestator be not in view of the testator, or where he might see if he chose to do so, without being assisted to do so, it will be ineffectual to pass lands. *Ibid*, 622-24.

WILLS—CONTINUED.

8. The signing of a will must be in the presence of the testator. *Ibid*, 627.
9. When the condition of a testator is such immediately after signing the will, and before the subscribing by the requisite number of witnesses, from sleep or other cause, that he becomes insensible to what is passing around him, and unconscious of the act of subscribing by the witnesses—which he has a right to supervise, and to determine whether he will supervise—the attestation is not, in the sense of the statute, in the presence of the testator, and the will invalid to pass land and slaves. *Ibid*, 628.
10. Though by the 11 sec. of the act of 1796, (*Stat. Law*, 443,) every grant, conveyance or devise of land from one person to another, “although the words necessary heretofore to transfer an estate of inheritance be not added,” is to be deemed a fee simple estate if a less estate, be not limited by express words, or do not appear to have been granted conveyed or devised by construction of law; yet these provisions do not preclude the questions in the construction of wills which contain indefinite devises without words of limitation, whether an estate in fee passes to the devisee, or an estate for life only—it is a question of intention, though the ancient rule is reversed. *Carroll's heirs vs Carroll's heirs*, 641.
11. The word *or*, will not be construed as *and*, unless such a construction be necessary to prevent absurdity, or to prevent the destruction of a devise for uncertainty. *Robb vs Belt and Milam*, 647.
12. Where there is a bequest to A *or* his personal representative, or to A *or* his heirs, the word *or* generally implies a substitution, so as to prevent a lapse. (*Williams on executors*, 3 *Am.*, from 4 *Lond.*, *Ed.*, page 1041.) *Ib.*, 648.
13. The clause of a will in these words after a devise to Martha, the daughter of the testator, “and if my said daughter Martha Moore, should depart this life without issue, it is my desire that the aforesaid willed property, shall be equally divided between my brothers and sisters, to wit,” &c—held that these words import a dying without issue, living at the death of Martha, the first taker. *Moore vs Moore*, &c., 653, to 60.
14. The term issue, in common parlance, means immediate descendants. *Ib.*
15. The language of wills is to be construed according to common intendment. See *Devisees passim*. *Witness* 2.

WITNESS.

1. A husband of a devisee of land and personal estate who has no interest, may be a competent witness to prove the will; but his declarations made before the death of his wife, (the devisee,) are not competent evidence against the will after the death of the wife. *Allen, &c.*, vs *Everett, &c.*, 375.
2. One named as executor is a competent witness to prove the will, unless he is to receive under the will, other and greater interest than an ordinary trustee who receives a commission for his services—the possibility that he may abuse his trust, will not disqualify him as a witness. *Orndorff vs Hummer*, 619.

WRITS OF ERROR.

1. The statute of 1838, (3 *Stat. Law*, 35,) giving to defendants in error, the right to assign cross errors, without prosecuting a cross appeal, or suing out a writ of error, does not deprive the party who may fail to avail himself of the benefit of that statute, of the privilege of suing out a writ of error after an affirmance of the decree or judgment upon the appeal or writ of error of the other party. *Wickliffe vs Buckman*, 424.

ERRATA.

Page 50, Fourth line from the bottom, read *but* instead of *at*.

" 60, Read *Caperton & Burnam*, instead of *Carpenter*.

" 69, Marginal note, 4 lines from the bottom ; for *testator* read *devisee*. 2 from top, for *slaves*, read *land*.

" 89, Eighth line from bottom, leave out *to* ; and for *whom*, read *when*.

" 117, Sixteenth line from bottom, for *carrying*, read *carving*.

" 171, In note, for *Benton*, read *Barton*.

" 189, In note, read *prudently* for *pracedently*.

" 190, In note for *pracedently*, read *prudently*.

" 368, Third line from bottom, for *evlndence*, read *evidence*.

" 385, In note, for *donor*, read *donce*.

" 664, Fifth line from bottom, for *co-tenancy*, read *contrivance*.

